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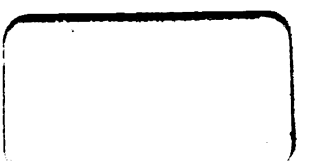

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IN THE

SUPREME COURT

OF

WASHINGTON

NOVEMBER 7, 1908—FEBRUARY 25, 1909

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JUDGES

OF THE

SUPREME COURT OF WASHINGTON

DURING THE PERIOD COVERED IN THIS VOLUME

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ERRATA.

Page 51, line 13 from top, for Port Dodge read Fort Dodge.
Page 356, line 8 from top, for Gridley read Grilley.

ERRORS NOTED IN PREVIOUS VOLUMES.

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Page 561, top of page, should read verdict of jury.

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RULES OF THE SUPREME COURT

ADOPTED APRIL 17, 1909.

RULE I.

COURT RECORDS AND BOOKS.

The Clerk of the Supreme Court shall keep the following books and records:

(1) Journal.
(2) Record of opinions.
(3) Appearance docket.
(4) Motion docket.
(5) Fee book.
(6) General index of cases.
(7) In addition to the foregoing, the Clerk shall keep books in which shall be stated proper accounts of all moneys received and disbursed.

RULE II.

DOCKET FEES.

The Clerk of the Supreme Court will not file any transcript until the appellant shall have deposited with him the statutory docket fee; and he will not file any paper in any original motion, application or proceeding until the moving party shall have deposited such fee.

RULE III.

TRANSCRIPTS.

(1) Every transcript shall be plainly typewritten with a black record ribbon or printed, on paper of good quality of the size of legal cap, and be free from interlineations and erasures, and be duly paged, and prefixed with an alphabetical index to its contents specifying the page of each separate paper, order or proceeding and of the testimony of each witness, and have at least one blank fly leaf. Every

statement of facts and bill of exceptions must also be printed or typewritten, and when typewritten none other than a black ribbon copy shall be used.

(2) Every transcript consisting of more than fifty leaves shall be bound under the direction of the Clerk of the Supreme Court.

RULE IV.

TRANSCRIPTS—OMISSIONS.

If any paper or part of the record directed to be sent up has been omitted from the transcript in any case, such omission may be supplied by any party at any time before the cause is assigned for hearing, without leave, by filing a properly certified transcript of such paper or part of the record with the Clerk of the Supreme Court, and at the same time giving the opposite party notice thereof. After a cause has been assigned for hearing, a paper or part of the record can be supplied only by leave of court.

RULE V.

CLERK'S CERTIFICATE.

(1) Transcripts must be certified by the Clerk of the Superior Court in substantially the following form:

STATE OF WASHINGTON, ... COUNTY, ss.

I, ..., Clerk of the Superior Court for..... County, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellant to transmit to the Supreme Court.

In testimony whereof, I have hereunto set my hand and the seal of said Superior Court this ..... day of ....., 19....

[SEAL.] ....., Clerk.

By ....., Deputy.

(2) Supplemental records shall be certified by the Clerk of the Superior Court substantially in the same manner.

RULE VI.

TAKING PAPERS FROM CLERK'S OFFICE.

No paper filed with the Clerk of the Supreme Court shall be taken from the court room or Clerk's office except by per-

mission of the Court or one of the Judges, and when so taken a receipt in writing therefor must be left with the clerk. Permission to take papers will not be granted except to a party, or his attorney who shall have entered an appearance in the Supreme Court in the cause in which such paper is filed.

RULE VII.

ADDITIONAL AUTHORITIES.

In case either party, after filing briefs, desires to submit additional authorities, the same shall be submitted not less than one day prior to the hearing of the appeal. Authorities so submitted shall be written or printed, and twelve copies thereof shall be filed with the Clerk of the Supreme Court, and not less than one copy served upon the adverse party.

RULE VIII.

CONTENTS AND STYLE OF BRIEFS.

(1) Briefs shall be printed throughout in plain, clear type not smaller in size than small pica, on unglazed white paper, and shall contain a clear statement of the case so far as deemed material by the party, with references to the pages of the transcript for verification.

(2) Each error relied on shall be clearly pointed out and separately discussed: *Provided*, That several assignments presenting the same general questions may be discussed together.

(3) In citing authorities, the title of the case and the name and number of the volume must be clearly set out in each place in the brief where the case is mentioned; and in citing text books, the number of the edition must be specified.

(4) Briefs must be of the following dimensions, to wit: 8½ inches from top to bottom; 6½ inches from edge to edge, inclusive of the margin, which must be 1½ inches at the top, bottom and outer edge of each printed page. The cover shall be gray in color, or some color that will readily show the print. The title of the case, the designation—"Brief of Appellant," "Brief of Respondent," "Appellant's

Reply Brief," as the case may be—and the names of the attorneys signing the brief, with their postoffice address, shall be printed on the front cover.

(5) In all equity causes and actions at law tried by the court without a jury, the party or parties appealing shall print in their brief the findings of fact, with the exceptions thereto, on which any question is sought to be raised by them on the appeal; and shall also print such findings as they requested the lower court to make and which were refused, with their exceptions to such refusal, in case any error or contention shall be based thereon.

(6) Twenty-five copies of all printed briefs shall be filed with the Clerk.

RULE IX.

ASSIGNMENT OF CAUSES.

(1) For the purpose of hearings in the Supreme Court, causes from the several counties will be assigned as follows:

(1) Thurston; (2) Mason; (3) Lewis; (4) Chehalis; (5) Pierce; (6) King; (7) Kitsap; (8) Pacific; (9) Wahkiakum; (10) Cowlitz; (11) Clarke; (12) Skamania; (13) Snohomish; (14) Skagit; (15) Whatcom; (16) Island; (17) San Juan; (18) Jefferson; (19) Clallam; (20) Kittitas; (21) Yakima; (22) Benton; (23) Klickitat; (24) Chelan; (25) Okanogan; (26) Douglas; (27) Grant; (28) Adams; (29) Lincoln; (30) Franklin; (31) Walla Walla; (32) Columbia; (33) Asotin; (34) Garfield; (35) Whitman; (36) Spokane; (37) Stevens; (38) Ferry.

(2) Exceptions to this order may be made when public interests require.

(3) Ten days before the beginning of each session of the Court, the Clerk shall assign for hearing, in the order named in subdivision 1 of this rule, any cause on the docket ready for hearing, to that Department of the Court to which it has been apportioned by the Chief Justice. A cause on the docket of the Court shall be deemed ready for hearing when it appears that the transcript is on file; and—

(a) That the appellant's opening brief, the respondent's brief, and the appellant's reply brief are on file.

(b) That the appellant's brief and respondent's brief are on file, and the latter has been served upon the appellant for a period of ten days or more.

(c) That the appellant's brief is on file, and has been served upon the respondent for a period of forty days or more.

(d) That the appellant's opening brief and the respondent's brief are on file, and more than twenty days will elapse between the time of service of the respondent's brief and the time the cause is fixed on the calendar for hearing.

(e) That the appellant's brief is on file, and all parties to the appeal have stipulated that the cause may be assigned for hearing at such session.

(4) Reply briefs in any case must be filed with the Clerk of the Supreme Court not later than Thursday of the week preceding the date the case is assigned for hearing.

(5) Cases ready for hearing may be submitted on briefs by stipulation at any time, and when so submitted shall be entitled to as prompt consideration as other cases then before the Court.

RULE X.

CALENDAR.

As soon as the cases shall have been assigned for a regular session of the Court, the Clerk shall print a calendar thereof, indicating at the head of each page of such calendar the Department of the Court to which the case has been apportioned, and shall mail a copy of the calendar to each attorney or firm having any cause thereon.

RULE XI.

ARGUMENTS.

Not more than two counsel on a side will be heard upon the argument of any case, unless the court shall direct otherwise: *Provided*, That each party who has appeared separately and by different counsel in the Superior Court shall, if he so desire, be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the

argument upon the merits in all cases. In argument of motions and all preliminary or collateral matters, the counsel for the party having the affirmative of the issue shall open and close. Arguments upon the merits shall be limited to one-half an hour upon a side, and all other arguments to one-quarter of an hour upon a side, unless an extension of time be obtained from the Court before the argument is commenced.

RULE XII.

ERRORS CONSIDERED.

No alleged error of the Superior Court will be considered by the Supreme Court unless the same be clearly pointed out in the appellant's brief: *Provided*, That the objection that the Supreme Court has no jurisdiction of the appeal may be taken at any time.

RULE XIII.

REHEARINGS AND HEARINGS EN BANC.

(1) Every petition for rehearing or hearing *en banc* must be filed within thirty days after the opinion shall have been rendered, and not more than one petition for a rehearing or hearing *en banc* shall be filed: *Provided*, That the Court may, in its discretion, allow any petition to be amended. The filing of a petition for rehearing or hearing *en banc* shall suspend the decision of the Court until a ruling thereon.

(2) One typewritten copy of the petition for rehearing or hearing *en banc*, filed with the Clerk, shall be sufficient.

(3) When a decision is rendered upon a petition for rehearing or hearing *en banc*, the Clerk shall promptly notify counsel for the respective parties.

RULE XIV.

COST BILLS.

(1) The prevailing party shall, within ten days after the filing of the opinion in a case, file with the Clerk a cost bill, and serve upon the adverse party a copy thereof. If any

adverse party objects to any item or items thereof, he shall serve upon the prevailing party exceptions to such cost bill, together with affidavits in support of his exceptions, if desired, and file the original, with proof of service, with the Clerk of the Court within ten days after service of the cost bill upon him; whereupon the Clerk shall tax the costs to which the prevailing party is entitled, and shall notify the parties of such taxation. Either party may except to the taxing of any item or items, or failure to tax the same, and shall serve such exceptions on the adverse party and file the same with the Clerk within ten days after such taxation. Said exceptions shall be heard by the Court on the first motion day after the expiration of five days from the date of service of such exceptions. If the party fail to appear at such time, the Court will consider such exceptions upon the affidavits on file and the records in the cause, and determine the same.

(2) If no cost bill is filed and served, the Clerk will tax as costs only the Clerk's costs, printing of briefs at seventy-five cents per page, the statutory attorney's fee, and the cost of the transcript at the rate of five cents a folio.

(3) Where a cost bill has been served and filed in time, and no exceptions are filed, objection thereto will be deemed to have been waived.

RULE XV.

SUBMISSION ON FAILURE TO APPEAR.

Where a party does not appear when the cause is called for hearing, and the appeal has been perfected, and the brief of said party is on file, the cause, as regards such party, will be deemed submitted. This rule shall not preclude oral argument by the opposite party.

RULE XVI.

RESPONDENT FILING NO BRIEF.

Where the respondent fails to file a brief in the cause, the Court will take the submission of the same by the appellant,

and decide upon the merits of the appeal, if it shall appear to have acquired jurisdiction of the cause.

RULE XVII.

MOTIONS—HOW MADE AND HEARD.

(1) Motions to strike out any portion of the transcript, or to dismiss or affirm upon the record, and all technical motions tending to prevent the hearing of a cause upon its merits, may be made in writing and noticed for some Friday of the session, or the last Friday of any month of the year, excepting the months of July and August; or the same may be made and plainly stated in the respondent's brief and heard at the time the cause is assigned upon the calendar.

(2) All other motions in appealed causes must be made in writing and noticed for some Friday of the session, or for the last Friday of any month, excepting the months of July and August, at the opening of court on that day. The motions referred to in this and the preceding paragraph will be known as *noticed motions*.

(3) At least two days before the day set for the hearing of such a motion, the motion and notice, with proof of service thereof, must be filed with the Clerk. The Clerk will prepare a calendar of noticed motions for each Friday, in the order of their filing, and they will be given precedence of other hearings on that day.

(4) The Fridays of the weeks during the regular hearing of cases and the last Friday in each month, excepting the months of July and August, are hereby designated as motion days.

(5) The moving party shall file with the Clerk, at or before the hearing of any motion, twelve copies of a printed or typewritten list of the authorities relied upon to sustain the motion, and the opposing party shall, at or before the hearing, file a like number of copies of a printed or typewritten list of authorities relied upon to oppose the motion.

RULE XVIII.

NOTICES OF MOTIONS.

(1) All notices of motions not given in the briefs must be in writing; and the necessary time of notice shall be not less than ten days, unless a different time is fixed by statute or the special order of the Supreme Court; but where the service of a notice is made by mail between different places, the time of notice above mentioned shall be thirteen days.

(2) Service of papers must in all cases be made upon the attorney of record of a party, if he have one, unless the place of business or residence of such attorney is unknown, when it may be made upon the party.

RULE XIX.

SERVICE OF PAPERS.

Service of papers may be made as follows:

(1) If upon an attorney, by delivering to him personally, or at his office by delivery to his clerk or to the person having charge thereof; or if his office be not open, or there be no one in charge thereof, at his residence by delivery to some person of suitable age and discretion; or, if neither of the foregoing methods can be followed, by deposit in the postoffice to his address, with postage prepaid: *Provided*, That in capital cases a motion to dismiss an appeal shall be served upon the defendant personally, as well as upon the attorney of record.

(2) If upon a party, by delivery to him personally, or at his residence by delivery to some person of suitable age and discretion, between the hours of 9 o'clock in the forenoon and 9 o'clock in the evening.

RULE XX.

SERVICE—RESIDENCE UNKNOWN.

Where the residence of a party and that of his attorney of record, if he have one, are not known, the service may be made upon the Clerk of the Superior Court in which the cause was tried, for the party or attorney.

RULE XXI.

SERVICE BY MAIL.

(1) Service may be made by mail when the person making the service and the person on whom such service is to be made reside in different places between which there is regular communication by mail. Postage must in such cases be prepaid.

(2) Time shall begin to run from the date of deposit in the postoffice.

RULE XXII.

HABEAS CORPUS.

(1) A Judge of the Supreme Court, when applied to for writs of *habeas corpus*, may make the same, if granted, returnable before himself or before the Supreme Court, or before any Superior Court of the state, or any Judge thereof.

(2) Upon such an application, however, the Judge applied to may make an order to show cause why the writ should not issue returnable before the Supreme Court.

(3) Unless there be special reasons to the contrary, writs of *habeas corpus* will be issued by the Supreme Court only after a hearing, upon an order to show cause.

(4) In all cases where the person whose release is sought to be obtained by an original writ from the Supreme Court is imprisoned in the penitentiary or in a county jail upon a charge or conviction of felony, service of the order to show cause and petition must be made upon the superintendent or sheriff, as the case may be, the prosecuting attorney of the county from whence the prisoner was committed or in which he is confined, and the Attorney General at his office in Olympia.

(5) Where the imprisonment is in a county jail upon a charge or conviction of a misdemeanor, the service must be upon the prosecuting attorney and sheriff of that county.

RULE XXIII.

OTHER ORIGINAL WRITS.

(1) In all other cases of applications to the Supreme Court for original writs, under either its original or its

appellate jurisdiction, the applicant shall show that he has given notice to the opposite party, or his attorney of record, of his intention to apply for such writ, and the time thereof, or furnish satisfactory reasons by affidavit for his failure to give such notice.

(2) The notice above required shall not be less than four nor more than fourteen days. Applications under this rule must be made on a regular motion day, unless there be some special emergency requiring earlier action.

(3) When the papers are presented, the opposing party shall be at liberty to make any objections he sees fit based on the face of the papers.

(4) Upon the final hearing of any application under this rule, each side shall furnish for the use of the Court twelve written or printed copies of their points and authorities.

ADMISSION OF ATTORNEYS.

RULE XXIV.

TIMES FOR EXAMINATION.

The first Thursday and Friday of each session of the Supreme Court are hereby designated as the times for examination of applicants for admission to practice as attorneys and counselors at law.

RULE XXV.

EXAMINATION—WRITTEN AND ORAL.

Such examination shall be written, or written and oral, as hereinafter provided.

RULE XXVI.

QUALIFICATIONS.

Applicants for admission shall possess the qualifications required by statute.

RULE XXVII.

APPOINTMENT OF COMMITTEE.

The Supreme Court shall, from time to time, as provided by statute, appoint a committee of the Bar of the Supreme

Court of the State of Washington to aid and assist in the examination of applicants for admission.

RULE XXVIII.

FILING NOTICE OF APPLICATION.

(1) Any person making application for admission to the bar, as herein provided, shall file a notice of such application with the Clerk of the Supreme Court at least one week before the first Thursday of the session of the Supreme Court at which he applies for admission, and shall pay to the Clerk the sum of twenty-five dollars ($25) in full of all fees, which sums shall be returned to the applicant in the event that his application for admission be denied.

(2) Each application for examination shall be accompanied by the affidavit of the applicant showing the matters required by section 2 of the act of March 15, 1909, Laws 1909, p. 533, and shall present to the committee before whom he is to be examined, satisfactory evidence that he has the qualifications required by such act.

RULE XXIX.

BASIS OF EXAMINATION.

Such examination shall be based upon written questions and the answers thereto, and such oral questions as the committee may see fit to propound.

RULE XXX.

WRITTEN EXAMINATION.

The committee shall prepare and submit to the applicant numbered questions in writing, to be answered in writing.

While engaged in answering the questions, the applicant shall be in a room free from interruption, and shall be upon honor not to communicate with any person, or to read any book or paper upon the subject of the answer to any question submitted to him.

Six hours will be allowed in which to prepare the written answers. The number of each question shall precede each

answer. Each page of answers shall be signed by the applicant.

Immediately upon concluding his written answers, the applicant shall deliver them to the committee.

RULE XXXI.

ORAL EXAMINATION.

Upon the day following the applicant's written examination, he shall be examined orally in open court by the Court or the committee, at such length as may be deemed proper.

RULE XXXII.

ADMISSION UPON EXAMINATION.

As soon as convenience will permit, the committee shall satisfy itself, from the applicant's written and oral examinations, whether or not he should be admitted, and announce the result to the Supreme Court. The Court shall then determine whether or not the applicant shall be admitted.

RULE XXXIII.

PRACTICE.

Admission to practice in the Supreme Court shall entitle an attorney to practice in all the courts of the state.

Any person a resident of the State of Washington heretofore admitted to practice in any of the Superior Courts of said state shall be entitled to admission in the Supreme Court upon the production of a certified copy of his admission and the filing of the same with the Clerk of the Supreme Court, together with his own affidavit that he is not under judgment of disbarment or suspension of any court. The fee for entering said admission and for a certified copy of such record shall be twenty-five dollars ($25).

RULE XXXIV.

DISBARMENT AND SUSPENSION.

The judgment of disbarment or suspension of the Supreme Court, or of any Superior Court of this state, shall disqualify

any attorney against whom the same is pronounced from practicing as an attorney in any of the courts of the state until the same shall be reversed or vacated; and any attorney who, while so disbarred or suspended, shall practice as an attorney, shall be deemed guilty of a contempt, and punished accordingly.

RULE XXXV.

ADMISSION ON MOTION WITHOUT ATTENDANCE.

In all cases where an examination is not required, personal attendance of an applicant shall not be necessary to obtain an order of admission, but the same may be had upon motion, upon taking the oath before any officer authorized to administer oaths, and submitting proof thereof with the further proofs required by the act of March 15, 1909.

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 7487. Decided November 7, 1908.]

HERBERT HIPKINS, *Appellant*, v. J. H. ESTES *et al.*, *Defendants and Respondents*, EDWARD MILLER CORNICE & ROOFING COMPANY *et al.*, *Interveners and Respondents.*[1]

EXECUTORS AND ADMINISTRATORS—SALE TO PAY DEBTS—FRAUD—HUSBAND AND WIFE—COMMUNITY PROPERTY—PURCHASE BY WIFE OF ADMINISTRATOR—FRAUDULENT CONVEYANCES—EVIDENCE—SUFFICIENCY. There is no evidence of fraud warranting the setting aside of an administrator's sale to his wife of lands of the estate to pay a mortgage, alleged to have been purchased by the wife with community funds of herself and husband, where it appears that part of the estate was covered by a mortgage for $1,575, that the mortgage was purchased by the administrator's wife, one of the heirs, with money given to her by her husband for that purpose, and that she bid in the mortgaged property and also the balance of the estate on a deficiency judgment; it appearing that she paid more than the mortgage was worth, the face of which exceeded the value of the entire property; and the fact that the land afterward became valuable, and was deeded by the wife to satisfy a subsequent debt of the husband would not establish fraud or that the same was not her separate property.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 24, 1907, upon findings in favor of the defendants, after a trial before the court without a jury, in an action to enforce a trust in lands. Affirmed.

[1]Reported in 97 Pac. 1089.

Ralph Woods (*Loveday, Kelley & McMillan*, of counsel), for appellant.

T. W. Hammond, for respondents.

E. R. York, for interveners.

DUNBAR, J.—William Hipkins died intestate on the 26th day of April, 1901, at Tacoma, leaving as heirs at law Rosalia Estes, May Hipkins, Kate Hipkins, Nellie Hipkins, and Herbert Hipkins, all of whom were of age, with the exception of Herbert Hipkins who was then about seventeen years old. His estate consisted of lots 1, 2, 9, 10 and 11, in section 4, township 19, north, range 2, east, W. M., containing about about one hundred and sixty acres of land. There were substantially no debts, except a mortgage to one Frederick Meyer on lots 1, 2 and 11, of said tract, containing about ninety acres, amounting altogether with accumulated interest to $1,575. On the 7th day of June, 1901, the respondent John H. Estes, husband of the respondent Rosalia Estes, was appointed administrator of the estate of the decedent, upon petition of all the heirs aforesaid.

In August, 1901, Rosalia Estes purchased of Frederick Meyer a mortgage upon part of the estate of the said decedent, paying therefor the sum of $1,200, which sum was furnished her by John H. Estes, as a gift. On the 7th day of November, 1901, Rosalia Estes, as the purchaser of said mortgage, brought her petition in the probate proceedings, praying that the administrator be required to redeem that portion of the property covered by the mortgage, failing which, that an order be made that the property be sold for the purpose of satisfying the mortgage; to which petition John H. Estes, as administrator, made answer on the 11th day of November, 1901, that there was no personal estate or personal property in decedent's estate, and that it was impossible to redeem said mortgage. Thereafter, on the 19th day of November, 1901, an order for the sale of the mortgaged property was made, and the same was sold in due course on the

16th day of December, 1901, to Rosalia Estes, the petitioner and wife of the administrator, for the sum of $700, she being the only bidder at the sale. Subsequently this sale was confirmed.

On February 15, 1902, John H. Estes, as administrator, filed a petition setting forth that there was outstanding a claim of $875.95, the same being a deficiency on a mortgage held by Rosalia Estes after the sale of the mortgaged premises, claim for which had been presented and allowed by the administrator and by the court; and praying that the court would make an order to sell the whole of the real estate or such portion thereof as might be necessary to provide funds for the payment of the debts of the estate and the expenses of administration. Upon the same date an order to show cause was made to all persons interested in the estate. Proof of service was duly made. Subsequently, on March 25th, the court made an order that all the real estate be sold at public auction for cash, and on April 21, 1902, Richard W. Jamieson was appointed guardian *ad litem* of the appellant Herbert Hipkins, to show cause, if any, why such sale should not be had. On April 23d, the guardian *ad litem* made answer, and reported that he had examined the records of the case and informed himself concerning the sale and the expediency thereof and the necessity therefor, and found that such sale was necessary, and that no injustice would be done to the minor by such sale. On May 29th, the administrator reported that on May 19th he had sold the property at public auction, and that the highest and only bid he had received was from Rosalia Estes, for the sum of $875, and on May 29th, the court made an order confirming the sale to Rosalia Estes. On August 22, 1902, the administrator filed his final report, and prayed that it be accepted as his final account. On September 20, 1902, J. L. Murray was appointed guardian *ad litem* for Herbert Hipkins, and on October 9, 1902, reported that he had examined the report and account of the administrator and found

the same to be correct and true, and that the same should be allowed and settled, which was done.

Thereafter John H. Estes became involved in a government contract, as a result of which he became insolvent, and the intervener, Edward Miller Cornice & Roofing Company and R. A. Gove, as sureties upon his bond under the contract, were obliged to and did pay about $27,740, and thereafter took judgment against Estes in that amount. Thereafter Rosalia Estes conveyed to Edward Miller Cornice & Roofing Company all of the lands in question except ten acres, the consideration being the satisfaction of the value of the judgment held by her garnishees against her husband John H. Estes. During the time that the lands in question were in possession of Rosalia Estes, timber to the amount of some fifteen hundred cords was sold therefrom, for about $500.

Thereafter the plaintiff brought his bill to charge upon the property so taken by John H. Estes and Rosalia Estes a trust in his favor to the amount of his interest, and for damages for waste so far as the same affected his interest, and for other and further relief. After trial upon the merits, the court below refused to grant the prayer of the bill, and gave judgment against the plaintiff, from which judgment plaintiff appeals.

It is urged by the appellant, that a fraud was perpetrated upon the estate by collusion between J. H. and Rosalia Estes; that the money which was furnished to Rosalia Estes with which to purchase the property was not a bona fide gift, but was in reality at that time and remained the community property of J. H. Estes and wife; that the rest of the heirs were not aware of the fact that Rosalia Estes had purchased the mortgage of Meyer for less than its face value, and that at least constructive fraud was perpetrated upon the estate and upon this appellant. Conceding, for the purpose of this decision, the correctness of all the propositions of law urged by appellant, we are still of the opinion that the judgment is justified by the testimony, for the evidence does not bring the actions of the respondents within the inhibition of the law

as urged by counsel. Whatever may be the legal inability of the administrator to purchase the real estate of lands which he is administering, and however wholesome the policy of the law which forbids it, are questions which are not involved in this case, for lawsuits must be determined on evidence, and there is no testimony of any kind tending to prove that the administrator was the purchaser of any of the lands of this estate.

All the testimony that was offered was that of the defendants Mr. and Mrs. Estes, which was to the effect that the purchase was made by Mrs. Estes. It is true that they both candidly said that the money with which it was purchased was given by Mr. Estes to his wife in response to her indicating a desire to purchase the old home for a future home for her mother, who had expressed a wish to again live there with her minor son, this appellant. It might be that in some jurisdictions this money would still be construed the money of the husband, or at least of the community, but such a rule cannot prevail in this state where a married woman has a right to own, purchase, or sell land as her separate property. The intimate relations existing would, it is true, warrant close scrutiny into the transaction to determine if any fraud or collusion had been perpetrated upon the estate, but such scrutiny in this case does not disclose any wrongful intention or act. The record shows that all the proceedings leading up to and including the sale of the land were regular, and that such sale was recommended by appellant's guardian *ad litem*, and the testimony of such guardian *ad litem* was to the effect that he examined the record and based his report upon it.

Appellant places great stress upon the statement that the mortgage was bought by Mrs. Estes for less than its face value, but there is nothing suspicious about this circumstance, for the testimony shows that, through her desire to obtain the place as a future home for her mother, she gave much more for the mortgage than the land was worth; the testimony of the mortgagee being to that effect, viz., that he knocked the

interest off because he wanted to get rid of the mortgage, and that he did not think the whole one hundred and sixty acres was worth the amount of his mortgage. A stranger would undoubtedly have had a legal right to have petitioned for a sale of the remainder of the land, or so much as was necessary, to satisfy his legal claim against the estate; and there is no legal barrier to one of the heirs of the estate who is a creditor invoking the same remedy.

Without reviewing in detail the testimony of the appellant's witnesses in relation to the promises made by Rosalia Estes, it was too vague, uncertain and contradictory to be convincing. All that it did establish was that certain promises had been made after the settlement of the estate, mere gratuitous promises entirely without consideration, matters over which courts are without jurisdiction, and amenable only to the forum of conscience. It is true that this land, which at the time of its purchase by Mrs. Estes was comparatively worthless, by the projection of railroads in that vicinity and the vicissitudes of business generally, became so valuable that Mrs. Estes was enabled with one hundred and fifty acres of said land to relieve her husband of a very large obligation. But this debt was incurred years after the purchase of the land by her, the undisputed testimony being that at the time her husband was solvent and owed no debts; and there is nothing in the fact that she was willing to use it for that purpose that militates against the idea that it was her separate property. When asked what induced her to give her property in payment of her husband's debt she replied: "I suppose my own interest that I would have in him, and wanting him to be free from debt. It was my own free will—more than glad to do it." It seems to us that her action in this respect, instead of indicating a desire to defraud any one, exhibited a commendable wifely trait, which it is to be hoped is not so rare as to provoke adverse criticism or create a suspicion of fraud.

It not being claimed that there was any error in the proceedings, the appellant's case must rest entirely upon as-

sumption of fraud, and there being no testimony upon which fraud can be predicated, the judgment will be affirmed.

MOUNT, ROOT, RUDKIN, and FULLERTON, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

[No. 7643. Decided November 7, 1908.]

PETER SANDBERG *et al.*, *Respondents*, v. CHARLES ROWLAND *et al.*, *Appellants*.[1]

PARTY WALLS—AGREEMENT RUNNING WITH LAND—INTENTION—CONSTRUCTION OF CONTRACT. A party wall agreement runs with the land, and a conveyance of the lot on which the building was erected passes to the grantee the right to enforce payment for the wall when used, where that was the intention of the parties, and such an intention sufficiently appears where the agreement binds the owners of the adjoining lot, "their heirs, executors, administrators and assigns" to pay for one-half of the wall whenever they build or use the wall.

SAME — PAYMENT — TRIAL — AGREED STATEMENT OF FACTS. An agreed statement of facts showing that defendants paid one Z for a party wall after Z had conveyed the property to the plaintiffs and while plaintiffs were in possession, sufficiently shows that defendants had not paid the plaintiffs therefor.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered September 22, 1908, in favor of the plaintiffs upon an agreed statement of facts. Affirmed.

Boyle, Warburton, Quick & Brockway, for appellants.

Bates, Peer & Peterson, for respondents.

DUNBAR, J.—This is an action brought by plaintiffs, respondents here, on a party wall agreement. It was tried in the court below upon stipulated facts. The pertinent facts stipulated are as follows: That on and prior to the 17th day of April, 1890, William Zinram and Francis Zinram, his wife, were the owners in fee simple of lot 9, in block 1504, in the

[1]Reported in 97 Pac. 1087.

city of Tacoma, and that on and prior to the said 17th day of April, 1890, J. B. Thompson and Ida E. Thompson, his wife, were the owners in fee simple of the adjoining lot 8 in said block; that on said 17th day of April, 1890, William Zinram and Francis Zinram, as parties of the first part, and J. B. Thompson and Ida E. Thompson, as parties of the second part, made and entered into a certain contract for the erection of a party wall upon the line between the two lots above described, which said contract was duly recorded in the office of the auditor of Pierce county. After setting forth in the agreement a description of the wall which the parties of the first part agreed to erect, the agreement concludes as follows:

"In consideration of the payments and erection by the said parties of the first part of the said party wall, the parties of the second part for themselves, their heirs, executors, administrators, and assigns agree that whenever they shall erect or cause to be erected or whenever any other part of the said party wall is utilized for a building other than the one now on said lot number eight they will pay the said parties of the first part, their heirs or assigns, their proper proportion of the price of said party wall at that time without interest, price to be paid by parties of the second part to be determined at the time the party wall shall be purchased by the said parties of the second part."

It was further stipulated, that, subsequent to the making of said contract and pursuant thereto, said William Zinram and Francis Zinram caused to be erected on the line between said lot 9 and lot 8 a party wall, four stories high, the full length of said lot; that on or about the 30th day of December, A. D. 1904, the Philadelphia Securities Company, being the owner in fee simple of said lot 9, made and executed an agreement of sale of the premises to the plaintiffs herein;—it is not necessary to set forth this agreement of sale—that said plaintiffs entered into possession of said property under said contract; that thereafter the plaintiffs, under the terms and provisions of said contract, received a warranty deed from the

said Philadelphia Securities Company for said lot 9 on the 26th day of January, 1907; that the defendants are now, and at all times since the 24th day of January, 1903, have been, the owners in fee simple of lot 8 aforesaid, and the assignees and successors in interest of said J. B. Thompson and Ida E. Thompson, his wife; that said defendants on or about the 1st day of July, 1906, caused to be erected a five-story brick building upon said lot 8, and have utilized therefor the party wall theretofore erected by William Zinram and Francis Zinram upon the line between said lots 8 and 9; that on the 29th day of November, 1905, William Zinram and Francis Zinram acknowledged the receipt from Charles Rowland and Clara Williams of full payment of any and all claims under said party wall agreement, and granted the said Charles Rowland and Clara Williams the right to the use of the said party wall without any further compensation; that the proportion of said party wall at the time it was used and utilized by the defendants was of the reasonable value of $1,673.59; that the defendants have failed, refused, and neglected to pay the plaintiffs any part of the value of said party wall, although requested so to do. After the hearing and argument of counsel on said agreed statement of facts, the court charged that the plaintiffs were entitled to a judgment against the defendants for the sum of $1,673.65, costs, and disbursements. From this judgment in favor of the plaintiffs, this appeal is taken.

On the subject of the payment of the expense of the construction of a party wall, the decisions of the courts have not been uniform. On the contrary, there has been an irreconcilable conflict. In New York and Illinois it has been uniformly decided that the payment for a party wall is in no way connected with the land, and that the covenants in regard to the payment of the same or for its use cannot be construed to run with the land. But these are extreme cases, the logic of which does not seem to have appealed to courts generally. In other jurisdictions it has been determined that the right

to that portion of a party wall resting on the lot of an adjoining owner is not personal to the owner of the lot on which the building is erected, but one running with the land, and that therefore a conveyance of the lot on which the building is erected passes to the grantee the right to recover of the adjacent owner the value of one-half of the wall when used by him. In many other jurisdictions it is held that it is purely a question of intention, to be gathered from the agreement of the original parties to the contract.

It is conceded by the appellants in this case that the doctrine of New York and Illinois has been repudiated by this court in *Hoffman v. Dickson*, 47 Wash. 431, 92 Pac. 272, 93 Pac. 523, and it was there decided that such covenants run with the land, but that it must appear from the party wall agreement that such was the intention of the parties to the contract. It is stoutly contended, however, that the terms of the contract in that case were essentially different from the terms of the contract in the case at bar, and that that case is therefore not an authority which would sustain the judgment in this case. It is true that the language of the agreement in that case was not identical with the language of the agreement in this case. In the *Hoffman* case it was provided that the covenants should run with the land and should bind the heirs, legal representatives and assigns of the respective parties to the contract. But the whole argument of the opinion indicates that the court would have affirmed the judgment if the language had been identical with the language used in this case. The decision was based largely upon the decision of the case of *Southworth v. Perring*, 71 Kan. 755, 81 Pac. 481, 114 Am. St. 527, 2 L. R. A. (N. S.) 87, and what was said in the answer to the petition for rehearing in that case, in 82 Pac. 785, and the argument of the court in that case, was quoted with approval. In that case the language of the agreement which was construed was as follows:

"The parties hereto bind and obligate their heirs, executors, administrators and assigns to the fulfillment of all the terms and conditions of this agreement."

It is contended by the appellants that such words are stronger than the words used in the contract here under consideration, and are easily distinguished therefrom. While the language is more redundant, the legal effect is exactly the same, for the statement that the parties of the second part, for themselves, their heirs, executors, administrators, etc., is just as binding upon themselves, their heirs, executors, administrators, and assigns as though they had stated that they were bound. The court in its conclusion stated:

"We regard contracts of the character of that here involved as in their nature so related to the real property affected, and so adapted to impose their obligations and bestow their benefits upon the successors in title of the landowners by whom they are made, that the purpose that they shall have that effect is readily to be inferred from the employment of language having any substantial tendency in that direction. In the present case we hold that the use of the clause making the terms of the contract binding upon the heirs, executors, administrators and assigns of the parties sufficiently indicates that intention. What the effect of the omission of that provision might have been we do not determine."

But it is also contended by appellants that the cases cited and relied upon in *Southworth v. Perring*, *supra*, do not justify the conclusion reached by the court in that case. An examination of those cases convinces us that the contention is not justified, but that on the contrary many of the cases cited were determined on language less calculated to evince an intention to cause the covenants to run with the land than was the language used in that case. The authorities are so exhaustively set forth in that opinion and in the subsequent opinion on petition for rehearing, as also in the opinion of this court in *Hoffman v. Dickson*, *supra*, that we do not feel justified in again reviewing them, but hold that in this case the covenants to pay for the wall were covenants running with the land.

There seems to be nothing in the contention that the agreed statement of facts does not affirmatively show that payment for the wall had not been made to the Philadelphia Securities Company. The respondents were in possession of the premises and the wall at the time appellants paid the Zinrams, and it would be a violent presumption, in the absence of any showing or claim to that effect, that they then proceeded to pay the Philadelphia Securities Company after the surety company had contracted to convey the land to respondents.

The judgment is affirmed.

MOUNT, RUDKIN, and FULLERTON, JJ., concur.

ROOT, J., dissents.

HADLEY, C. J., and CROW, J., took no part.

[No. 7648. Decided November 7, 1908.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. PIERCE COUNTY *et al.*, *Respondents*.[1]

DRAINS—DRAINAGE DISTRICTS—PROCEEDINGS — PRELIMINARY COSTS —LIABILITY OF LAND—BENEFITS. Under Laws 1895, ch. 115, authorizing the organization of a drainage district where an improvement would be of special benefit to a majority of the lands included in the proposed boundaries, property included in the district which was found to be not benefited may be proportionally taxed with all the other land in the district to pay the preliminary expenses to ascertain whether the proposed improvement should be carried out, upon abandonment and dismissal of the proceedings for lack of sufficient benefit to cover the cost; the power to levy such tax being incident to the main power conferred, and is not affected by failure of the contemplated improvement.

SAME—OBJECTIONS—WAIVER. A land owner who makes no objections to proceedings to establish a drainage district until after decree is made, is estopped to object to anything except the constitutionality of the law.

[1]Reported in 97 Pac. 1099.

SAME—TAXATION—POWER TO LEVY COSTS OF PROCEEDINGS. The power of the legislature to authorize the levy of a tax upon a drainage district to pay the preliminary expense of ascertaining whether the improvement shall be made, does not depend upon whether the district is a municipal corporation, and the tax cannot be objected to where the burden was voluntarily assumed by a vote of the people of the district.

STATUTES—TITLE AND SUBJECTS—AMENDMENTS. LAWS 1903, p. 90, relating to drainage districts, does not violate Const. art. 2, § 37, providing that no act shall be revised or amended without setting out the same in full, since the same is a complete law of procedure within itself.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 14, 1907, in favor of the defendants, upon sustaining a demurrer to the complaint. Affirmed.

B. S. Grosscup and *W. C. Morrow*, for appellant.

H. G. Rowland and *Robert M. Davis* (*Emmett N. Parker* and *R. J. Burglehaus*, of counsel), for respondents.

DUNBAR, J.—This case came up on appeal by the plaintiff from an order and judgment entered by the superior court of Pierce county sustaining a demurrer to the complaint and dismissing the action. The complaint was addressed to the equity side of the court, and set up substantially the following facts: That the plaintiff is the Northern Pacific Railway Company; that Pierce county is a municipal corporation, and E. M. Lakin is treasurer of the same; that about the 10th day of September, 1904, drainage district No. 4, of the county of Pierce, was established; that thereafter the said commissioners commenced a proceeding in the superior court of Pierce county, entitled "Frank R. Spinning, Charles A. Stewart and T. S. Pierce, as the board of drainage commissioners of drainage district No. 4, of Pierce county, Washington, plaintiffs, and H. M. Anderson et al., defendants," for the purpose of prosecuting the construction of a system of drainage within said district; that the plaintiff was joined

as defendant in said proceeding, and filed its answer denying that any benefit would accrue to it or its property by reason of the construction of said drainage ditch; that upon a trial of the cause verdict was entered by the jury exempting plaintiff and its property from any assessment on account of the construction of said ditch, on the ground that no benefit would accrue to plaintiff or its property by reason of such construction; that thereafter on the 13th day of January, 1906, said action was ordered to be dismissed by the superior court, for the reason that the estimated cost of the construction of the proposed improvement by said district, including damages to be paid, would exceed the benefit which would be assessed; that thereafter, to wit, on the 10th day of September, 1906, an order and decree was entered in this cause ascertaining the indebtedness and directing a tax levy wherein the total amount of warrants or evidences of indebtedness, with accruing interest, was ascertained to be $3,339.75, and the county commissioners were directed to levy a tax on the real estate within said district exclusive of improvements, sufficient to pay said outstanding warrants and evidences of indebtedness; that thereafter the said county commissioners proceeded to and did levy a pretended tax upon the property of plaintiff in said district, amounting to the sum of $1,388.75; that the tax rolls and records of the defendant Pierce county, Washington, show such taxes levied against plaintiff's main line and side track; that defendants and each of them were threatening to enforce the collection of said pretended taxes by the sale, or attempted sale or conveyance of said property; that plaintiff is greatly annoyed, injured, and hindered by the said pretended taxes and tax liens, and the assertion of the same by the defendants against plaintiff's property; that said pretended levy of taxes was assumed to be made by virtue of § 6, chap. 67, p. 90, of the laws of the state of Washington for the year 1903; wherefore plaintiff prays that an injunction issue against defendants and each of them, forever enjoining and restraining them from in any way attempting to

enforce the collection of said pretended taxes. Other statements appear in the complaint which are conclusions of law and which it is not necessary to set forth. The defendants, through the prosecuting attorney H. G. Rowland, filed a demurrer to the complaint, which demurrer was sustained by the court.

It is the contention of the appellant that an examination of the various provisions of chap. 115, Laws of 1895, shows that the legislature had in mind but two classes of land to be included within the drainage district, to wit, those receiving benefit by reason of the proposed improvement and those necessary to be condemned in carrying out the work; and as it affirmatively appears that the appellant's lands were not benefited by reason of the judgment in that respect, and that the improvement was abandoned, it follows that its lands should not be taxed to pay the expenses of ascertaining whether or not the improvements should be made. This contention is not consistent with the provisions of § 4, chap. 115, Laws of 1895, for the reason that that section provides for the organization of a district where an improvement would be of special benefit to a majority of the lands included in the proposed boundaries, thereby especially negativing the idea suggested by the appellant that the law contemplated the inclusion only of such lands as were benefited; and the constitutionality of this law was determined by this court in *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779, and subsequent cases. There is nothing in the complaint indicating that the proceedings leading up to the formation of the district were not in strict compliance with the law, nor that there was any objection to the incorporation of appellant's lands into the district. The essential complaint is only that the proceedings for the purpose of raising money to pay the preliminary expenses of the proposed improvement which failed were illegal, and that its land should not be taxed because it had been determined that they would not have been benefited by the improvement if it had been carried out.

It is possible that an investigation to determine the benefits flowing from a proposed improvement might develop the fact that none of the lands in the district would be benefited by the improvement. In such case every owner could put forth the same objection to the payment of his share of the preliminary expenses as does the appellant here; and for the same reason. The improvement not having been made, there seems to be no reason in equity why all the lands in the district should not proportionately pay the expenses which were necessarily incurred in determining the question whether the improvement should be made, it being borne in mind that those expenses were not incurred in making an improvement which failed to benefit certain lands, but were expenses preliminary to determining the question above stated, a question entirely foreign to any question of assessment of damages or benefits from or by the construction of the improvement. So that no objection having been made by the appellant at any stage of the proceedings to the formation of the district and the inclusion of their lands in said district, nor to the petition and proceedings under which the decree determined the amount of the indebtedness of the district, the right of appeal from all of such proceedings existing, it is estopped to object to anything but the constitutionality of the law under which the assessment is sought to be made and the tax collected, for it seems plain that the provisions of the law have been complied with.

The constitutionality of the original act having been determined, the power complained of here, viz., the power to tax for the purpose of carrying out the provisions of the act, it seems to us, is necessarily incident to the main power conferred and is not affected by the fact that the contemplated improvement has failed; for it became necessary, in order to carry out the original scheme contemplated and to determine facts which had to be determined in order to make the scheme effective, to incur the expenses complained of. The legisla-

ture in this instance has not violated § 12 of art. 11 of the state constitution by imposing any tax upon it.

Nor is it necessary to determine whether this drainage district is a municipal corporation, within the meaning of said § 12 under which the power to assess and collect taxes is especially conferred. The state constitution is a limitation and not a grant of power, and the legislature has supreme authority, in the absence of constitutional limitations expressed or necessarily implied. This is an organization voluntarily entered into under powers, regulations and forms prescribed by the legislature, and the burden of paying the expenses necessary to effectuate the object of the organization was voluntarily assumed by a vote of the people. As we said in *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428: "So long, therefore, as the tax is imposed by the corporate authorities, the evil sought to be avoided by the constitutional provisions is not incurred." In this case the burden being self-imposed, there is no room to exclaim against legislative power.

Nor do we think that chapter 67 of the Laws of 1903 falls under the ban of § 37, art. 2 of the constitution, which provides that: "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length;" for the reason that an examination of the act plainly shows that it is a law of procedure complete within itself.

There appearing to be no valid constitutional objections to the law under which the tax is sought to be collected, and it not appearing that there has been any violation or misconstruction of the law, the judgment is affirmed.

MOUNT, RUDKIN, FULLERTON, and ROOT, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

[No. 7517. Decided November 10, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK O. BRIDGHAM, *Appellant*.[1]

HOMICIDE—EVIDENCE—DYING DECLARATIONS. A dying declaration is admissible, although it did not contain the express declaration that deceased believed she was about to die and she did not actually so state, where it appears from other evidence that she believed she was *in extremis*, and did die from the illness from which she was suffering as the direct result of the injury.

SAME—EXTREMIS. It sufficiently appears that a dying declaration was made *in extremis*, where the deceased was informed by a physician that the wound was mortal, that she was rational and realized the fact and said that she did not think that she could get well, and gave directions as to her burial and the care of her children.

SAME—CONTENTS—PRIOR THREATS—INSTRUCTIONS. It is not error to admit in evidence a dying declaration which contained a statement of prior threats, where the jury were instructed not to consider any reference therein to threats made by the defendant.

EVIDENCE—OBJECTIONS—SUFFICIENCY. An objection to a coroner's record of an inquest because it was not complete does not raise the question of its relevancy or materiality.

SAME—TRIAL—OBJECTIONS. A stipulation at a trial that exceptions shall be considered taken to all adverse rulings, does not obviate the necessity of necessary objections at proper times.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS. Objections to the evidence cannot be first raised on appeal.

HOMICIDE—PREMEDITATED MALICE—DELIBERATION — INSTRUCTIONS. An instruction as to premeditated malice that there need be "no particular" length of time between the formation of the intent to kill and the killing is not objectionable as failing to recognize that there must be deliberation and time therefor.

CRIMINAL LAW—EVIDENCE—SANITY—OPINIONS OF EXPERT. In a prosecution for homicide, committed by defendant after he had been drinking intoxicating liquor, opinions of a physician testifying as an expert, as to the probable effect thereof upon his mind, are admissible upon an issue as to defendant's sanity.

[1]Reported in 97 Pac. 1096.

HOMICIDE — DELIBERATION — EVIDENCE — SUFFICIENCY. There is sufficient evidence of deliberation in the murder of defendant's wife, where it appeared that they had quarreled the day before and on the morning of the shooting, and that they separated and defendant procured a revolver and returned, making a trip of two miles, drew his revolver while holding her, and shot her while she was running away.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence is properly denied where the same is merely cumulative.

INDICTMENT AND INFORMATION—HOMICIDE—CHARGE OF KILLING—SUFFICIENCY. An information for murder in the first degree sufficiently charges that the accused killed the deceased and the means by which it was done, where it alleges that he shot her by the use of a revolver pistol, producing a mortal wound from which she died the next day.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered March 25, 1908, upon a trial and conviction of murder. Affirmed.

Pruyn & Felkner, for appellant.

U. E. Harmon, for respondent.

HADLEY, C. J.—The defendant was charged with having committed the crime of murder in the first degree, by shooting and mortally wounding Lula Bridgham, who was his wife. The defense of not guilty, including a claim of insanity at the time of the shooting, was interposed. The jury returned a verdict of guilty of murder in the first degree. The court entered judgment and sentence that the defendant shall suffer the penalty of death, and he has appealed to this court.

The first error assigned is that the court admitted a written statement as the dying declaration of the deceased. It is argued that the statement should not have been admitted for the reason that there was nothing upon its face showing that the deceased realized at the time that she was about to die or that her death was imminent and impending. The further argument is made that the evidence introduced in

connection with the statement did not show that the deceased said she was about to die or that her death was imminent and impending. The standard required for the admissibility of the declaration is that the declarant should have believed that she was about to die, that she made the declaration under the belief that she would not recover, and that she did die of the illness from which she was suffering as the direct and proximate result of the original injury which the declaration tended to illustrate. *State v. Power*, 24 Wash. 34, 63 Pac. 1112. It was not necessary that the written statement should contain the express declaration that the declarant believed she was about to die, and it was not necessary to show by other testimony that she actually used the words. It was sufficient to show, either by the statement itself or by other credible testimony, such statements or circumstances as would convince a reasonable mind that the declarant believed at the time that she was *in extremis*. The testimony showed that the deceased was informed by a physician that her wound was mortal and that she could not live; that she was rational and realized she could not live; that she said she did not think she could get well, and she expressed the wish that her son would look out for her three babies; that she said her daughter's ashes were in a jar in her trunk and she wanted them buried with her. We think it was clearly shown that the declarant made the statement under the belief that she was about to die, and her death soon followed.

The declaration contained a statement of prior threats, and appellant contends that he was prejudiced thereby. He cites *State v. Moody*, 18 Wash. 165, 51 Pac. 365, to sustain this contention. In that case the dying declaration contained a statement of previous threats, and it was contended that these should have been excluded. The court, however, admitted the whole statement and gave no instruction with respect to disregarding the subject of prior threats as based upon the statement. This court said: "We think the court erred in not instructing the jury that this part or portion of the dying

declaration should be disregarded." In the case at bar the court directly covered that point in closing its instruction upon the subject of the dying declaration, as follows:

"Furthermore such declarations are only admitted to prove the actual killing and the manner of the killing so that if you consider this statement at all you will not in any manner consider any statements therein in reference to previous threats made by the defendant, nor will you consider any other statements therein except that which relates to the actual killing at the time and the manner in which the killing was done."

We do not find that the court erred in admitting the dying declaration, in view of its instruction upon that subject.

It is insisted that the court erred in admitting in the evidence the record of the inquest before the coroner's jury. We find nothing in this record showing that the coroner's record was read in evidence before the jury. Other written evidence is shown to have been read, but it does not so appear as to the coroner's record. The state's counsel asserts that it was not read, and that the record is for that reason silent upon the subject. Assuming, however, from the fact that it was formally admitted by the court, that it was also read to the jury, we can find no sufficient objection to it. The objection made by the counsel who tried the cause was as follows: "We object because it shows on the face of it that it is not a complete record." There was no objection to its relevancy or materiality. We think it appeared that the record was sufficiently complete to meet appellant's objection. Counsel who conducted this appeal, but who did not try the cause below, insist that there was an agreement at the trial, sanctioned by the court, to the effect that a general objection should be understood as lodged against all the evidence. The stipulation to which counsel refer appears in the record as follows:

"Mr. Harmon: Note an exception. In order to save time in taking exceptions, at all times whenever there is an adverse ruling of the court, the counsel might have an understanding between themselves that in that case that an exception be

noted. We think that is usually the rule. Court: Very good."

It will be seen that the above related exclusively to the matter of avoiding the announcement of an exception each time there was an adverse ruling upon an objection; but it did not relieve counsel from making the necessary objections at proper times. Otherwise there could have been no adverse rulings as the basis for the understood objections. The court committed no error in the matter of the coroner's record. Other objections cannot be raised for the first time on appeal. *State v. Craemer*, 12 Wash. 217, 40 Pac. 944; *State v. Owens*, 15 Wash. 468, 46 Pac. 1039; *State v. Yourex*, 30 Wash. 611, 71 Pac. 203.

Objection is made to the following instruction:

"Premeditated malice is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given. There need be no particular length of time between the formation of the intention to kill and the killing. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer."

Appellant's argument is that the instruction does not sufficiently observe the necessity for time for deliberation and premeditation as an element of murder in the first degree, and the case of *State v. Rutten*, 13 Wash. 203, 43 Pac. 30, is cited. The criticism of the instruction in that case was that the court told the jury there need be no appreciable space of time between the intention to kill and the act of killing, and that in deliberation, the intent to kill and the act of killing may be as instantaneous as the successive thoughts of the mind. It was believed that such an instruction did away with the idea of deliberation. The court interpreted the instruction to mean that an intention to kill may come instantaneously to the mind, and that it may be instantaneously carried into execution at the same moment, thus connecting the idea of deliberation directly with the act of killing. In

State v. Straub, 16 Wash. 111, 47 Pac. 227, the court made it clear that an instruction which does not so directly connect the two is not objectionable. In that case the trial court in its instruction said:

"Premeditation may be as quick as thought in the mind of man;" and this court said that "any conviction or intention that enters into the mind of man enters with the rapidity of thought;" but held that the instruction did not say that the intention might be formed and its execution carried out in the same or successive instants, as was believed to be true of the instruction in *State v. Rutten, supra.* We think the instruction in the case at bar amply recognizes that there must be deliberation and time therefor, but that no definite standard as to lapse of time is necessary. In using the expression, "There need be no particular length of time," the words "no particular" were used in the explanatory sense that no fixed or definite time is necessary, it being only necessary that there must be actual time for deliberation.

Errors are assigned as to certain questions which the court permitted a witness to answer, on the ground that they called for pure opinion testimony. This witness was, however, being examined as a physician and as an expert touching the defense of insanity, and his opinion became proper evidence. There was evidence to the effect that appellant had been drinking intoxicating liquor, and the questions related to the probable effect thereof upon his mind. We find no prejudicial error in this regard.

It is insisted that the motion for new trial should have been granted for the reason that there was no specific evidence of premeditation or deliberation. It is unnecessary to extensively set forth the evidence here. It is sufficient to say that we think there was an abundance of evidence upon that subject for the jury. The two had quarreled the day before the shooting, and had quarreled and separated in the morning of the day of the shooting. Appellant went to the house of his son-in-law and got the revolver with which he killed his wife. He after-

wards made a trip of two miles after dark and went to the house where his wife was. After inducing her to put down the baby which she was holding, he asked her to go outside and talk with him. She declined to do so. He caught her around the waist, still insisting that she should go out with him, and while holding her he reached for the revolver. She succeeded in breaking away from him, and as she ran he shot her. Further comments upon this subject we think are not necessary.

We think the contention that the court should have granted a new trial on account of newly discovered evidence, is not well taken. The proposed new evidence is merely cumulative upon the question of appellant's insanity, and under the decision of *State v. Underwood*, 35 Wash. 558, 77 Pac. 863, the motion for new trial on that ground was properly denied.

It is next urged that the court should have sustained appellant's motion in arrest of judgment, on the ground that the information is not sufficient to sustain a verdict of murder in the first degree. Omitting the formal commencement and conclusion, the information is as follows:

"Comes now U. E. Harmon, prosecuting attorney for the said Lewis county, state of Washington, the said superior court of said Lewis county being in session and the grand jury for said county not being in session, and now here said prosecuting attorney gives the said superior court to understand and to be informed by this information that the above named Frank O. Bridgham is guilty of the crime of murder in the first degree committed as follows: The said Frank O. Bridgham in said Lewis county, state of Washington, on to wit: the 2nd day of November, A. D. 1907, unlawfully, feloniously, purposely and of his deliberate and premeditated malice and with intent to kill, did shoot Lula Bridgham with a revolver pistol, then and there held in his hand, and then and there unlawfully, feloniously, purposely and of his deliberate and premeditated malice, by shooting with intent to kill as aforesaid did mortally wound her the said Lula Bridgham, from which mortal wounding the said Lula Bridgham, on the third day of November, 1907, at Centralia, Lewis county, state of Washington, died."

It is argued that the information, neither directly charges that the accused killed the deceased, nor states the means by which the killing was done. Surely no one who understands the English language can read the information and fail to know that the accused is charged with mortally wounding the deceased, and that with deliberate and premeditated malice, with intent to kill, he shot her by the use of a revolver pistol, producing such mortal wound, from which she died. More is not required under our law, and to require greater technical particularity would sweep aside the sensible tendency to liberality in modern criminal jurisprudence whereby the substance and not the form is more highly regarded.

We have discussed all the errors assigned. We think the appellant was given a fair and impartial trial, and that the record shows no prejudicial error.

The judgment is therefore affirmed.

RUDKIN, CROW, DUNBAR, MOUNT, and ROOT, JJ., concur.

FULLERTON, J., took no part.

[No. 7320. Decided November 10, 1908.]

AXEL GUSTAFSON, *Respondent*, v. A. J. WEST LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE — EVIDENCE — CHANGES AFTER ACCIDENT—ADMISSIBILITY. In an action for injuries sustained by an employee in an alleged passageway, in which the defendant denied that the place was a passageway, evidence is admissible of a change widening the place after the accident, where the sole object thereof was to show that the place was intended to be used as a passageway.

SAME — GUARDING MACHINERY — EVIDENCE — OPINION OF EXPERT. Upon an issue as to whether a saw was guarded under the factory act, an expert may give his opinion by testifying that simply looking at the saw would suggest the kind of a guard proposed by him.

[1]Reported in 97 Pac. 1094.

SAME—GUARDING MACHINERY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—QUESTIONS FOR JURY. Where an employee stumbled in a narrow passageway and fell onto a saw, the questions of his contributory negligence and assumption of risks, and of the master's negligence in failing to guard the saw under the factory act, are for the jury, where it appears that it was customary to use the place as a passageway, and there was specific evidence that the saw was not properly guarded and might have been; assumption of risks being no defense under the statutory duty to guard the saw.

APPEAL—REVIEW—EXCEPTIONS. One general exception to each and every instruction is not sufficient to assign error upon a given instruction.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 9, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a mill. Affirmed.

W. H. Abel and *A. M. Abel* (*Blattner & Chester*, of counsel), for appellant.

Govnor Teats, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries. The plaintiff, a minor twenty years of age, brought the suit by a guardian *ad litem*. The plaintiff was in the employ of the defendant, and was engaged in operating a feeder to the trimmer saw in defendant's lumber mill, at Aberdeen. The complaint alleges that, in the construction of the mill and trimmer saws therein, the defendant had constructed a passageway for employees to pass through in going from one part of the mill to another, and that the passageway was carelessly and negligently constructed so that it was only about fourteen inches wide at the end of the trimmer saw and where the saw, which was constantly running when the mill was in operation, formed one of the sides of the passageway; that the floor in the passageway where it passed the saw was negligently constructed so that it was uneven,

having little jogs in it sufficient to cause one to stumble, of which the plaintiff did not know until after the accident; that the defendant failed to guard the trimmer saw, although it was entirely practicable to guard it so as to make it absolutely safe; that the plaintiff was under the control and direction of the defendant's foreman, and the latter directed plaintiff to go to the rear of the trimmer saws, and that in order to do so it was necessary to go through the passageway; that the plaintiff went to the assistance of the foreman, and the latter thereupon directed plaintiff to go to another part of the mill and get an iron bar; that in obeying the order, it was necessary to go again through the passageway and, while attempting to do so, the plaintiff stumbled and, as his left hand was thrown out to support himself, it went into the saw, the saw caught the clothing and pulled the arm into the saw, completely severing the arm half way between the wrist and the elbow.

The defendant answered, denying that there was any passageway there, and also set up the defense that the plaintiff assumed the risk and that his injury was due to his contributory negligence. It was also alleged that the saw was guarded; that the state labor commissioner of Washington had duly inspected the mill while it was in that condition, and had determined that the defendant had complied with the laws of Washington with regard to safely guarding machinery. The case was tried before a jury, and a verdict was returned for the plaintiff in the sum of $2,000. Judgment was entered for the amount of the verdict, and the defendant has appealed.

It is assigned that the court erred in admitting testimony showing the condition of the passageway at a time subsequent to the accident. The appellant denied that there was any passageway there, or that the place there was intended to be used as such. In support of respondent's theory that there was a passageway and that it was so intended, evidence was admitted to show that the way was made wider to better serve passage purposes, and although this occurred after the acci-

dent, it was not admitted to show any confession of liability on the appellant's part, but merely in support of respondent's theory that there was a passageway, a fact wholly denied by appellant. The testimony was in dispute about the purpose of the change of the situation after the accident. Appellant contended that it was done to protect the men below from being struck by pieces of lumber falling through, while respondent contended that it was solely for better passage purposes. The sole object of admitting the evidence was to dispute appellant's theory and its witnesses who said there was no passageway there, and that it was not intended that such use should be made of the place. The evidence was not erroneous for that purpose. In *Sprqul v. Seattle*, 17 Wash. 256, 49 Pac. 489, it was held that it was not error to admit testimony on the part of the plaintiff as to the condition of the sidewalk on the next day after the accident, when it was stated that the sole object was for the purpose of impeaching a witness who had testified for the city upon that subject. See, also, *Townsend v. Northern Pac. R. Co.*, 29 Wash. 185, 69 Pac. 750; *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3; *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588.

It is next contended that the court erroneously permitted the witness Coxey to testify that simply looking at the saw should suggest the kind of guard proposed by the Coxey model. The witness was testifying as an expert, and as such he could give his opinion. We see no prejudicial error in this particular.

The next contention is that the court should have granted appellant's motion for nonsuit. This is based upon three grounds: (a) because respondent was guilty of contributory negligence; (b) because the saw was reasonably guarded, having due regard to the uses to which it was put and the dangers of its operation; (c) because respondent assumed the risk of voluntarily going into an exposed and dangerous place. We think all of these questions were for the jury. The evidence

showed that not only the men generally about the mill were in the habit of going through this passageway, but that the foreman himself did so, and that he took respondent through there the first day the latter worked at this saw. Under such circumstances it should not be said as a matter of law that respondent was guilty of contributory negligence by merely going through a way so generally used. The evidence of respondent's witnesses was specifically to the effect that the saw was not properly guarded, and that it might have been securely guarded. Methods for securely guarding it were shown by the testimony and it would have been error not to have permitted the jury to pass upon the question. The defense of assumption of the risk cannot be urged here if the saw was so situated that it was appellant's statutory duty to guard it. This has been so often held by this court that we need only refer to it here. The motion for nonsuit was therefore properly denied upon all three of the grounds named.

Error is assigned upon one of the court's instructions, but we find no sufficient exceptions in the record upon which to raise the question here. The record shows the following: "The defendant excepts to each and every instruction given by the court." No other exceptions are shown to have been taken by the appellant. This court has often held that, in the absence of specific exceptions directing the trial court's attention to particular instructions or specific subject-matter therein, no review of instructions will be made.

We see no error in the denial of the motion for new trial and in entering judgment upon the verdict, and the judgment is therefore affirmed.

RUDKIN, MOUNT, DUNBAR, CROW, and ROOT, JJ., concur.
FULLERTON, J., took no part.

[No. 7681. Decided November 10, 1908.]

A. H. AVERILL MACHINERY COMPANY, *Respondent*, v. J. B. ALLBRITTON *et al.*, *Appellants*.[1]

CHATTEL MORTGAGES—FILING—NOTICE. The filing of a chattel mortgage upon a traction engine with the county auditor and the indexing thereof, as required by Laws 1899, p. 157, § 2, is expressly made sufficient notice to all the world by § 3 of said act, and puts upon notice a subsequent lienor, without recording the same as in the case of real estate mortgages.

JUDGMENT—BAR—DISMISSAL WITHOUT PREJUDICE. The dismissal of an action to foreclose a chattel mortgage "without prejudice," is not *res judicata* and does not bar a subsequent suit to foreclose the mortgage, although the former action was dismissed for want of sufficient evidence.

MECHANICS' LIENS—INTEREST LIENABLE—PRIOR MORTGAGE—PRIORITY. Under Bal. Code, § 5903, providing that a mechanics' lien shall be preferred to any lien or mortgage which attaches subsequently to the time of the commencement of the work, a mechanics' lien for repairs on a traction engine is inferior to the lien of a prior chattel mortgage, duly filed and indexed so as to give constructive notice before the commencement of the repairs.

SAME—FORECLOSURE—PARTIES. A prior chattel mortgagee who was not made a party to the foreclosure of a mechanics' lien on a traction engine is not affected by the judgment of foreclosure sale.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered June 29, 1908, in favor of the plaintiff, upon an agreed statement of facts, in an action to foreclose a chattel mortgage. Affirmed.

G. E. Hamaker, for appellants.

U. E. Harmon, for respondent.

HADLEY, C. J.—This action was instituted to foreclose a chattel mortgage upon a Buffalo Pitts traction engine. The mortgage and unpaid notes secured by it had been assigned by the original mortgagee to the plaintiff, and the plaintiff

[1]Reported in 97 Pac. 1082.

brought the action against the mortgagor and maker of the notes, and also against the defendant Gustaveson as a person claiming some interest in the mortgaged property. The case was tried upon an agreed statement of facts, the essential facts being as follows: The mortgage was made September 21, 1903, and the engine was then situated in Lewis county, Washington. The mortgage was duly executed as a chattel mortgage with necessary acknowledgment and accompanying affidavit that it was made in good faith without intent to defraud creditors. It was filed in the auditor's office of Lewis county on the same day, and was duly indexed by the auditor as provided by law. At all times since, the mortgage has remained, and is now, on file in the auditor's office.

In the month of August, 1906, the defendant Gustaveson performed labor upon the engine at the request of the owner, and in order to secure payment for the same, he filed and recorded in the auditor's office a notice of lien as provided by law. In the month of November of the same year he proceeded to foreclose the lien, and obtained a judgment of foreclosure in the superior court. Execution sale was made upon said judgment, and the defendant Gustaveson became a purchaser. The sheriff executed to the purchaser a bill of sale for the engine, and the same was recorded in the auditor's office. The mortgage and its assignment were not recorded in the manner provided by law for the record of real estate mortgages, and the defendant Gustaveson had no notice thereof except such notice as the filing and recording as above stated gave him. When Gustaveson foreclosed his lien upon the engine, he did not make the plaintiff a party to the action, and the plaintiff had no notice of the pendency of the foreclosure. On the above facts, the court entered judgment in favor of the plaintiff, foreclosing its mortgage and establishing plaintiff's mortgage lien as prior to the lien of defendant Gustaveson. Gustaveson has appealed.

It is contended that the respondent's mortgage was not recorded so as to make its record notice to appellant. The

full contents of the mortgage were not copied upon the records as in the case of real estate mortgages; but the instrument itself was placed on file and was duly indexed in the auditor's office. The latest statute governing the record of chattel mortgages, so far as we are advised, is to be found in chapter 98 of the Laws of 1899, p. 157. Section 2 of the chapter is as follows:

"Every such instrument within ten days from the time of the execution thereof shall be filed in the office of the county auditor of the county in which the mortgaged property is situated, and such auditor shall file all such instruments when presented for the purpose, upon the payment of the proper fees therefor, indorse thereon the time of reception, the number thereof, and shall enter in a suitable book to be provided by him at the expense of his county, with an alphabetical index thereto, used exclusively for that purpose, ruled into separate columns with appropriate heads: 'The time of filing,' 'Name of mortgagor,' 'Name of Mortgagee,' 'Date of instrument,' 'Amount secured,' 'When due,' and 'Date of release.' An index to said book shall be kept in the manner required for indexing deeds to real estate, and the county auditor shall receive for the services required by this act the sum of fifteen cents for every instrument, and the moneys so collected shall be accounted for as other fees of his office. Such instrument shall remain on file for the inspection of the public."

The instrument in the case at bar was recorded in accordance with the above statute. The next section provides that

"Every mortgage filed and indexed in pursuance of this act shall be held and considered to be full and sufficient notice to all the world, of the existence and conditions thereof. . . ."

Appellant must, therefore, be held to have had notice of the mortgage.

It appears from the record that, in December, 1906, the respondent commenced an action to foreclose this same mortgage, and that such proceedings were thereafter had as resulted in a dismissal of the action. Appellant now contends that the judgment rendered in that action was *res judicata* of the subject-matter of this action. It is argued that the

court considered and adjudicated the case upon its merits. The judgment entered by the court, however, expressly stated that "said action be and the same is hereby dismissed without prejudice to the parties herein." This recital clearly shows that the court did not intend to determine the cause finally and upon its merits. While it is true the judgment entry further recites that testimony was taken, and that the testimony provided by the plaintiff was not sufficient to entitle it to relief asked, still the further entry quoted above is wholly inconsistent with an intention to finally adjudicate the merits. When the words "without prejudice" are used in an order of dismissal, they have a well defined meaning, and are always used for the express purpose of preventing the dismissal from becoming a bar to the bringing of another action.

"To obviate the general presumption of dismissal upon the merits, the dismissal should be stated in express terms to be made 'without prejudice.' Wherever it is not actually upon the merits, the term is used in order to reserve to the parties the privilege of enforcing their rights by subsequent proceedings and to destroy the effect of dismissal as a bar." 6 Ency. Plead. & Prac., pp. 994, 995, 996.

This court held that a judgment of dismissal without prejudice does not have the effect of *res judicata* on the merits of the controversy, even if the court erred in refusing to give judgment on the merits. *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961. Observations made in that case seem particularly apt as being conclusive against the appellant's contention here. The court said:

"The respondents next insist that the appellants cannot, in any event, recover, because the question became *res judicata* in the former action mentioned, which, as we have said, was dismissed without prejudice. It is not contended that the judgment actually entered therein had the effect of *res judicata* on the merits of the controversy, but the respondents were entitled in that action to a judgment on the merits, and that the court erred in refusing to enter it. It is evident, however, that it is the judgment actually entered in an

action which is or is not a bar to another action, not a judgment that might or ought to have been entered therein. It is, perhaps, needless to add that a judgment of a dismissal of an action without prejudice is not a bar to another action between the same parties for the same cause of action."

The remaining question in this case is whether the appellant could secure a lien subsequent to respondent's mortgage and without notice to the holder of the mortgage; or, without making it a party to the action foreclosing the lien, could secure a judgment cutting off respondent's rights in the property. The law in force when the mortgage contract was made became a part of the contract. The law upon the subject of liens of mechanics and materialmen at that time provided as follows:

"The liens created by this chapter are preferred to any lien, mortgage or other incumbrance which may attach subsequently to the time of the commencement of the performance of the labor, or the furnishing of the materials for which the right of lien is given by this chapter, and are also preferred to any lien, mortgage or other incumbrance which may have attached previously to that time, and which was not filed or recorded so as to create constructive notice of the same prior to that time, and of which the lien claimant had no notice." Bal. Code, § 5903 (P. C., § 6105).

It is manifest from the above statute that a lien such as appellant's is not preferred to a lien, mortgage or other incumbrance prior in point of time and which was filed or recorded so as to give constructive notice. Respondent's mortgage, as we have seen, had been filed and indexed so as to give constructive notice long before the creation of appellant's right to a lien. His lien was therefore junior to respondent's mortgage, and respondent, not being a party to the lien foreclosure, was not bound thereby or by the sale made thereunder.

We think the judgment is right, and it is affirmed.

RUDKIN, CROW, DUNBAR, MOUNT, and ROOT, JJ., concur.

[No. 7642. Decided November 10, 1908.]

The State of Washington, *Appellant*, v. George Shanklin *et al.*, *Respondents*.[1]

Gaming — Keeping Gambling Resort — Elements of Offense — Pool Selling. The keeping and having in charge of a public house or resort and engaging in betting, winning, and losing money in selling pools on horse races to persons congregating and resorting in such place for that purpose, may be informed against under Bal. Code, § 3096, providing that all public houses or places of resort where gambling is carried on or permitted are nuisances, and that the owners or keepers are punishable therefor as thereinafter provided; and this, whether or not selling pools on horse races is "gambling" within Bal. Code, § 7260, defining gambling and prescribing a punishment therefor; since the acts defined are not the only ones that constitute gambling.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered June 22, 1908, dismissing a prosecution for keeping a gambling resort, after sustaining a demurrer to the information. Reversed.

H. G. Rowland and *Lorenzo Dow*, for appellant.

Burkey, O'Brien & Burkey and *C. O. Bates*, for respondents.

Root, J.—Respondents were prosecuted upon an information which, omitting the formal parts, was as follows:

"That the said George Shanklin, Frank Moon and William Quinn, in the county of Pierce, in the state of Washington, on or about the third day of April, nineteen hundred and eight, and at divers times before said date, wilfully and unlawfully did own, run, maintain, operate, keep and be in charge of a certain public house and place of resort within the city of Tacoma, county of Pierce, and state of Washington, then and there being known as Tacoma Turf Exchange, and numbered 1213½ Pacific avenue, in said city of Tacoma, where gambling was then and there being carried on and

[1]Reported in 97 Pac. 969.

permitted by them, the said George Shanklin, Frank Moon and William Quinn, in that the said George Shanklin, Frank Moon and William Quinn did then and there engage for gain in betting, winning and losing money in selling pools on horse races, and where divers and sundry persons were permitted to congregate and resort to buy pools and to bet upon said horse races, to the common nuisance of all the people of said state, then and thereabouts being, contrary to the form of the statute, etc."

To this information they interposed a demurrer which was by the trial court sustained, and thereupon the action was dismissed and defendants discharged. From this order sustaining the demurrer, dismissing the case and discharging the defendants, the state appeals.

The action is evidently brought under § 3096 of Bal. Code (P. C. § 1871). A portion of this section reads as follows:

"All public houses or places of resort where gambling is carried on or permitted . . . are nuisances, and may be abated, and the owners, keepers, or persons in charge thereof, and persons carrying on such unlawful business, shall be punished as provided in this article."

The next section of the statute provides the punishment. It is contended by respondents, and their view was evidently entertained by the trial court, that gambling as defined in Bal. Code, § 7260 (P. C. § 1877), does not include betting, or selling pools, upon horse races, and that such acts are not "gambling" within the purview of the law of this state; and that not being gambling, the conducting of a place where these things are done and permitted does not render the keepers of such places subject to the section of the statute above quoted.

We do not think this position tenable. It is possible, but we do not so decide at this time, that betting upon a horse race or selling pools thereon may not be covered by Bal. Code, § 7260 (P. C. § 1877), but we do not understand that the acts therein mentioned are the only ones that constitute gambling. The terms "gaming" and "gambling" in the administration

and interpretation of criminal laws are usually regarded as synonymous. Under the old common law, gaming, when not so public as to constitute a nuisance, seems not to have been a criminal offense; but the keeping of a place where gaming was carried on was an indictable offense. In many of the states, betting on a horse race constitutes gambling. We think there can be little doubt that selling pools on a horse race is commonly understood to be and is regarded as gambling, and that in construing § 7260 (P. C. § 1877), it is but fair to assume that the legislature used the term "gambling" in its ordinary, general sense, and contemplated and intended the statute to comprehend acts of this character, whether such acts were in themselves criminal or otherwise. *State v. Nease*, 46 Ore. 433, 80 Pac. 897; *State v. Ayers* (Ore.), 88 Pac. 653; *Swigart v. People*, 50 Ill. App. 181; *Edward v. State*, 76 Tenn. 411; *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557; *Bell v. State*, 37 Tenn. 507; *Randolph v. State*, 9 Texas 521; *Foster v. State*, 84 Ala. 451; 14 Am. & Eng. Ency. Law (2d ed.), pp. 665, 666, 682.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to proceed with the prosecution.

DUNBAR, MOUNT, RUDKIN, and FULLERTON, JJ., concur.
HADLEY, C. J., and CROW, J., took no part.

[No. 7519. Decided November 13, 1908.]

WILL LANNING *et al.*, *Appellants*, v. ROGER McNEILL *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—REMEDY OF VENDOR—ACTION FOR PRICE—DEFENSES. Where, by the terms of a contract, $1,350 was to be paid in cash for land sold, and plaintiff had receipted for that sum on payment of $1,500, it is a good defense to an action for the balance that the parties had verbally agreed that two lots were to be conveyed and received in lieu of $350, and that defendants tendered a deed thereof.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 6, 1908, upon findings in favor of the defendants, dismissing on the merits an action for the contract price of land sold, after a trial before the court without a jury. Affirmed.

R. E. Taggart (*J. M. Phillips*, of counsel), for appellants.

John C. Hogan, for respondents.

PER CURIAM.—This action was brought to recover $350 from the defendants. The plaintiffs allege that they sold to the defendant Roger McNeill certain real estate in the city of Aberdeen, Washington, and that they gave him a contract for the sale to the effect that the price to be paid was $2,500, of which $1,350 was to be paid in cash and the balance in six months and one year from date; that in the contract the plaintiffs receipted for $1,350, whereas in fact but $1,000 was paid, leaving $350 still unpaid. Judgment is demanded for that sum and interest. The defendants answered, admitting that McNeill purchased the property and admitting that but $1,000 cash was paid at the time; but they allege that it was agreed verbally when the contract was signed

[1]Reported in 97 Pac. 1093.

that the plaintiffs would accept a conveyance of two lots in Aberdeen and $1,000 in cash in full of the first payment, and that the defendants would cause the title to the lots to be transferred from one Crain and wife to the plaintiffs. The cause was tried by the court without a jury, and the court found in accordance with defendants' contention, and gave judgment accordingly, from which the plaintiffs have appealed.

The answer presented a defense, and the demurrer to it was properly overruled. We have read the evidence and find that the court's finding that the two lots were to be taken in trade at a valuation of $350 is fully sustained. Proper deed conveying the title to the two lots to the appellants was tendered in due time and refused. The judgment is supported by the record, and it is affirmed.

FULLERTON and ROOT, JJ., took no part.

[No. 7625. Decided November 13, 1908.]

MIKE POPIELLA, *Respondent*, v. THOMAS ZOLAWENSKI *et al.*, *Appellants*.[1]

MECHANICS' LIENS—PERSONS ENTITLED — FURNISHING MATERIAL. The plaintiff is entitled to a lien for lumber furnished in the construction of defendant's house, where it appears that he worked in a mill and boarded with the defendants and agreed that lumber from the mill should be furnished to the defendants for use in building the house and the purchase price charged against his account for wages at the mill; and the fact that he handed defendants $60 to be applied in the same way on lumber bills would not constitute the transaction a loan, where it appears that it was his purpose to buy the lumber as his own material by using his wages and cash, and only handed the $60 to the defendants because of his inability to speak English and make himself understood at the mill office.

Appeal from a judgment of the superior court for Chehalis county, Clifford, J., entered January 20, 1908, upon findings

[1]Reported in 97 Pac. 972.

in favor of the plaintiff, after a trial on the merits, in an action to foreclose a mechanics' lien. Affirmed.

Austin M. Wade, for appellants.

John C. Hogan, for respondent.

PER CURIAM.—This is an action to foreclose a materialman's lien. The defendants are husband and wife, and they built a house in Aberdeen. The plaintiff claims to have furnished lumber for use in the house, and having filed his lien notice, he brought this suit to foreclose, and obtained a decree of foreclosure for the sum of $129.58, together with $25 for attorney's fees, and costs. From the judgment the defendants have appealed.

The evidence shows that the parties were all Polish people. Respondent was about twenty-two years old, had been in this country about a year and a half when the transaction concerning the lumber occurred, and he had lived in Aberdeen about nine months. He boarded at the house of the appellants, and worked at the lumber mill of Wilson Brothers & Company. It was agreed between him and the appellants that lumber from said mill should be furnished to the appellants for use in building their house, and that the purchase price thereof should be charged to respondent on his account for wages at the mill. This course was pursued, and lumber was so furnished. Sixty dollars in cash was also handed by respondent to appellants and the latter took it to the mill and applied it upon payment for lumber. It sufficiently appears from the evidence, however, that the reason for handing the money to appellants was that respondent could not speak English so as to be well understood at the mill office. We think it satisfactorily appears that it was respondent's purpose to buy the lumber as his own material by using his wages and the cash, and then to furnish it to appellants for their house. Appellants contend that the transaction was a loan, and that the lien cannot be enforced. A paper writing in the Polish language was

introduced in evidence, which appellants claim is a promissory note given for the loan. Translated into English, it is unintelligible as a promissory note, and we think the court's conclusion that the respondent is entitled to a lien is sustained by the record.

The judgment is affirmed.

FULLERTON and ROOT, JJ., took no part.

[No. 7504. Decided November 13, 1908.]

A. A. SCHUCHARD *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT FOR BENEFITS—AWARD OF DAMAGES—EFFECT—BAR AS TO ASSESSMENTS. In condemnation proceedings to assess damages for a regrade, where the jury were instructed, pursuant to Laws 1893, p. 189, § 15, that the lot owners were entitled to recover all damages resulting to their property by reason of the regrade, less any local or special benefits arising from the proposed improvement, a verdict for $100 damages is conclusive on the question of the amount of the benefits, and precludes any subsequent assessment for benefits to the portion of the lots not taken; section 22 of the act providing that no lot shall be assessed in excess of benefits nor shall any lot which the jury shall have found to be damaged be assessed for any benefits.

SAME—WAIVER OF OBJECTIONS—PETITIONERS. Where an improvement is ordered by the unanimous vote of the city council regardless of a petition and limitations contained therein, it cannot be urged that the petitioners are estopped to object to assessments of their property.

SAME—OFFSET OF DAMAGES—EFFECT. Where the benefits to property have once been offset against the damages for land taken in eminent domain proceedings, the land cannot be assessed for benefits from the improvement, regardless of the fact that the condemnation proceedings are entirely independent of the proceedings for assessment.

SAME. An assessment for local benefits from an improvement cannot be sustained, after offset of the same against the damages, on

[1]Reported in 97 Pac. 1106.

the theory that conditions might have changed since the taking or damaging of the property; as the legislature did not intend that the question of benefits should be twice litigated.

SAME—AWARD OF DAMAGES—VERDICT—BENEFITS. The jury, in awarding damages from a regrade under instructions to offset the benefits, could not have taken into consideration an assessment to be thereafter levied upon the property, they having no information as to the cost of the improvement or the limits of the district.

Appeal from an order of the superior court for King county, Morris, J., entered May 14, 1908, confirming an assessment for benefits by a local improvement in condemnation proceedings instituted by a city, upon an appeal from an order of the city council confirming the assessment. Reversed.

G. Ward Kemp, for appellants.

Scott Calhoun and *James E. Bradford*, for respondent.

RUDKIN, J.—Ordinance No. 13,102 of the city of Seattle, approved December 18, 1905, provided for the regrade of Jackson street, and numerous other streets, avenues and alleys in that city. After reciting that public necessity demanded the regrade and that the improvement would be of especial benefit to certain lands and premises and other property, the ordinance established the grades of the several streets, and directed the corporation counsel to file a petition in the superior court complying with the laws of the state, and praying that just compensation be made for the property and property rights taken or damaged by reason of the regrade. Pursuant to this authority a petition was filed for the purpose of ascertaining the damages to be paid to the owners of property taken or damaged. Among other property described in the petition and damaged by the regrade, were lots 5 and 6, of block 48, of D. S. Maynard's plat of Seattle, owned by the appellants, Schuchard and wife. A trial of the condemnation proceedings was had as between the city and the appellants. On that trial the court instructed the jury, in effect, that the

appellants were entitled to recover all damages resulting to their property by reason of the regrade, less any local or special benefits arising from the proposed improvement. This instruction was in accordance with section 15 of the act of March 9, 1893, Laws of 1893, page 189, which reads as follows:

"Sec. 15. When the ordinance providing for any such improvement provides that compensation therefor shall be paid, in whole or in part, by special assessment upon property benefited, the compensation found by the jury for any land or property taken shall be irrespective of any benefit from the improvement proposed. When such ordinance does not provide for any assessment, in whole or in part, upon property benefited, the compensation found for land or property taken, *and in all cases the damages found in respect to land or property not taken, shall be ascertained over and above any local and special benefit arising from such proposed improvement*, except as provided in section 2 of this act as to streets, avenues and boulevards established or widened to a width greater than 150 feet, in which class of cases no benefits shall be deducted as to such excess."

The jury returned a verdict in favor of the appellants, assessing their damages in the sum of $100, and a final judgment was rendered thereon. Thereafter by ordinance No. 13,309 a local improvement district was created, including within its limits the two lots above described, and the cost of the improvement under the regrade ordinance, less an appropriation of $30,000 from the general fund of the city, was assessed against the property within the district. An assessment roll was prepared, assessing $1,228.09 against lot 5, and $907.72 against lot 6, above described. Thereafter and within the time prescribed by law and the ordinances of the city, the appellants filed written objections to the proposed assessment, alleging in substance that, all local and special benefits arising from the proposed improvement had been offset against the damages awarded in the condemnation proceeding. The objections were overruled by the city council, and an or-

dinance was passed and approved confirming the assessment. The appellants appealed to the superior court, where the assessment was again confirmed, and the case is now before us for review.

The contention of the appellants in brief is, that all local and special benefits to their property arising from the proposed improvement, having been offset against the damages recovered in the condemnation proceedings, an assessment against the damaged property for the same improvement is wholly unauthorized. This contention must be sustained. It was so held by this court in *Smith v. Seattle*, 41 Wash. 60, 82 Pac. 1098, and the rule there announced is fully sustained by the authorities.

In *Chicago v. McCartney*, 216 Ill. 377, 75 N. E. 117, the court said:

"If the jury in a condemnation proceeding award damages for property not taken, the judgment is conclusive against a subsequent assessment proceeding to assess it for benefits, because the judgment is conclusive that there are damages and not benefits."

In *Davis v. Newark*, 54 N. J. L. 595, 25 Atl. 936, the court said:

"By force of the provisions of the charter, . . . the proper award for damages on alteration of grade is to be made after public notice, and with due regard to both the injury and the benefits arising from the public improvement, and this award, on being ratified by the municipal council, becomes conclusive upon the city, and also upon the private owner, subject only to a right of appeal. It is thus rendered equivalent to a judicial determination that the premises, for which the compensation is awarded, are damaged, on a comparison of benefits and injuries, to the extent of the award, and, so long as it stands, neither the owner nor the city can gainsay it. . . . It is therefore not permissible for the city now to contend that the change of grade, thus adjudged to be on the whole detrimental to certain lots on which buildings stood, was in fact on the whole beneficial to the same property. So far as the assessments against such houses and

lots have been levied for the grading of the street, they should be set aside."

In *State ex rel. Merchant v. District Court*, 66 Minn. 161, 68 N. W. 860, the court said:

"But it is very evident from the language of section 8 that the benefits for which assessments are there required include the same benefits which are required to be deducted by section 7. Moreover, the language of section 8 is mandatory, and not merely permissive. It not only requires such assessments to be made, but also that they shall be made on all property benefited; hence, if all the provisions of both sections are carried into effect, the result will be either that the landowner would be deprived of his property without just compensation, or else he would be taxed unequally, by being compelled to pay twice for the same thing. It follows that some part of the act must be rejected as void — either the provision in section 7 that special benefits to adjacent land shall be deducted from the value of the land taken, or else the provisions of section 8 in so far as they require assessments to be made for the same benefits. The provisions of section 7 constitute an exercise of the right of eminent domain, while those of section 8 constitute an exercise of the power of taxation—two entirely distinct things, although both exercised in the same proceedings. The provisions of section 7, standing by themselves, are confessedly valid, because they provide just compensation for the property taken. The vice is in the provision of section 8 that the residue of the land taken shall be taxed for the very benefits which have already been deducted from the value of the part taken, and which, therefore, have never been actually received by the landowner."

The act under which the condemnation proceedings was instituted expressly provides in § 22, "That no lot, block, tract or parcel of land shall be assessed a greater amount than it will be actually benefited, nor shall any lot, block, tract or parcel of land which shall have been found by the jury or court to be damaged be assessed for any benefits." While this provision relates to the assessment made by the commissioners appointed by the court to pay the awards in the condemnation proceeding, yet the same exemption necessarily extends to the assessment for the improvement itself.

We will now refer briefly to the different reasons assigned by the city for upholding the assessment. It is first contended that the appellants petitioned for the improvement and should now be estopped to deny the authority of the city to levy an assessment to defray the expense thereof. True, a petition signed by one of the appellants was presented to the city council, but it clearly appears from the record before us that the city elected to order the improvement by unanimous vote of its council, regardless of the petition and the limitations therein contained, and if so, it cannot now fall back on the petition to uphold an assessment which is otherwise unauthorized.

It is next contended that the proceedings to assess for the cost of the improvement is entirely independent of the condemnation proceeding. If the city cannot deprive a citizen of his property without due process of law in a single proceeding, it cannot accomplish the same result by two or more proceedings. Whether the proceedings are dependent or independent, the fact remains that an attempt is here made to levy an assessment on property for a local improvement after all local and special benefits to the property have been offset against damages.

It is next contended that conditions have or may have changed since the trial of the condemnation proceeding such as would warrant an assessment against the property, notwithstanding the previous verdict and judgment. The legislature never intended that the question of local and special benefits should be twice considered and litigated, once before a jury and again before the city council. We are satisfied that the question of local and special benefits to this property was determined finally and forever in the condemnation proceeding, in so far as the particular improvement there contemplated is concerned.

It is lastly contended that the jury in the condemnation proceeding must have taken into consideration in the award of damages the assessment to be thereafter levied against these

particular lots. The jury had nothing to do with the assessment or distribution of the cost of the improvement, and could under no circumstances have taken the assessment into consideration. They were not informed as to the cost of the improvement, the amount to be charged against the general fund of the city, the limits of the proposed assessment district, or the manner in which different properties in the district might be affected, and it is idle to contend that they took the assessment into consideration or that they were authorized so to do. On the entire record we are convinced that the assessment against the appellants' lots is wholly unauthorized and should be annulled. To that end the judgment is reversed, and the cause remanded to the court below.

FULLERTON, MOUNT, ROOT, and DUNBAR, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

[No. 7481. Decided November 13, 1908.]

ANTHONY BARRETT, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS — ASSESSMENTS — CONFIRMATION—BY CITY COUNCIL—APPEAL—NOTICE. A notice of appeal from the city council's confirmation of a local assessment is sufficient if it so particularly describes the proceedings that respondent could not have been misled by an erroneous reference to the condemnation ordinance.

SAME—TRANSCRIPT. Notice to a city clerk of the filing of a transcript on appeal from the city council's confirmation of a local assessment is not jurisdictional, and is waived by a general appearance of the corporation counsel.

SAME—CERTIFICATION. Objections to the city clerk's certificate to the transcript on an appeal from an assessment to the superior court cannot be reviewed when the certificate is not brought up in the record in the supreme court.

SAME—AMENDMENT. A defect in the city clerk's certificate to the transcript on an appeal from an assessment to the superior court may be cured by amendment.

[1]Reported in 97 Pac. 1109.

Appeal from an order of the superior court for King county, Morris, J., entered May 5, 1908, confirming an assessment for benefits by a local improvement in condemnation proceedings instituted by a city, upon an appeal from an order of the city council confirming the assessment. Reversed.

J. L. Corrigan, George E. de Steiguer, and *Ballinger, Ronald, Battle & Tennant*, for appellant.

Scott Calhoun and *James E. Bradford*, for respondent.

PER CURIAM.—The judgment in this case must be reversed on the authority of *Schuchard v. Seattle, ante* p. 41, 97 Pac. 1106, where an assessment on other property for the same improvement under the same state of facts was declared invalid, unless the court below failed to obtain jurisdiction of the appeal from the city council for certain reasons assigned by the respondent. It is contended that the notice of appeal filed with the city clerk was defective because it referred to the wrong ordinance; that no notice of the filing of the transcript in the superior court was served on the city clerk, as required by section 2, of chapter 118, of the Laws of 1901, page 242: and that the certificate of the city clerk to the transcript is defective. The notice of appeal described the proceedings appealed from with great particularity, and the respondent could not have been misled by a mere erroneous reference to the condemnation ordinance; the service of notice of the filing of the transcript on the city clerk was not jurisdictional (*Harris v. Tacoma*, 39 Wash. 185, 81 Pac. 691), and was waived by the general appearance of the corporation counsel; and the city clerk's certificate to the transcript has not been brought up in the record and we cannot judge of its sufficiency. In any event the defect might be cured by amendment.

The special objections urged by the respondent in this case are, therefore, without merit, and the judgment is reversed with directions to cancel and annul the assessment complained of.

HADLEY, C. J., and CROW, J., took no part.

[No. 7650. Decided November 13, 1908.]

SEATTLE & PUGET SOUND PACKING COMPANY, *Appellant*, v. THE CITY OF SEATTLE *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—OBJECTIONS BEFORE CITY COUNCIL—WAIVER—JURISDICTION. The objection that property sought to be assessed is exempt, by reason of a verdict and judgment in condemnation proceedings determining that the same was damaged in excess of benefits, is jurisdictional, and is not waived by failing to file objections to the assessment before the city council, under Laws 1901, p. 240, § 2, providing that the assessment cannot be contested by any person not filing written objections to the assessment roll.

Appeal from a judgment of the superior court for King county, Morris, J., entered June 29, 1908, in favor of the defendants, dismissing an action to annul a local improvement assessment, upon sustaining a demurrer to the complaint. Reversed.

Charles A. Riddle (*Graves, Palmer & Murphy* and *Alexander & Bundy*, of counsel), for appellant.

Scott Calhoun, *James E. Bradford*, and *Howard D. Hughes*, for respondents.

RUDKIN, J.—This action was instituted to cancel and annul a local improvement assessment, imposed by the city of Seattle on certain property owned by the appellant, and to remove a cloud. A demurrer to the amended complaint was sustained, and from the order of dismissal the present appeal is prosecuted. The assessment complained of is invalid under the decision of this court in *Schuchard v. Seattle*, *ante* p. 41, 97 Pac. 1106, and the judgment appealed from must be reversed on the authority of that case, unless the appellant is estopped to deny the validity of the assessment by reason

[1]Reported in 97 Pac. 1093.

of its failure to file written objections thereto before the city council as required by the act of March 16, 1901, Laws of 1901, p. 240. Section 2 of that act provides that:

"Whenever any assessment roll for local improvements shall have been prepared as provided by law, charter or ordinance of any city of the first class, and such assessment roll shall have been confirmed by the council or legislative body of such city, after due and proper notice to the property owner, as provided by law, charter or ordinance, so that said owners of property may have a reasonable opportunity to object to or protest against any assessment, the regularity, and correctness of the proceedings to order said improvement, and the regularity, validity and correctness of said assessment cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll, prior to the same being confirmed, as aforesaid, and at such time or times as may be prescribed by charter or ordinance."

Under the above and similar enactments, we have repeatedly held that all objections to the regularity of the proceedings of the council not going to the jurisdiction of that body are foreclosed by failure to appear and file written objections to the proposed assessment at the time and in the manner provided by charter or ordinance. *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131, 47 Pac. 236; *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353; *New Whatcom v. Bellingham Bay Imp. Co.*, 18 Wash. 181, 51 Pac. 360; *Northwestern & Pacific etc. Bank v. Spokane*, 18 Wash. 456, 51 Pac. 1070; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197; *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742; *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686; *Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632; *Renard v. Spokane*, 48 Wash. 345, 93 Pac. 517. At the same time it is conceded in all these cases that objections going to the jurisdiction of the city council are

not waived. *Potter v. Whatcom, Lewis v. Seattle,* and *Alexander v. Tacoma, supra.*

On the other hand, it has been held repeatedly, and we think correctly, that when an attempt is made to assess or levy a tax or assessment on property which is by law exempt from assessment or taxation, the property owner is not required to appear before the assessing or taxing officers, but may rest on his statutory rights and resist the tax or assessment at any time or in any form. *Illinois Central R. Co. v. Hodges,* 113 Ill. 323; *Rosehill Cemetery Co. v. Kern,* 147 Ill. 483, 35 N. E. 240; *Smith v. Osburn,* 53 Iowa 474, 5 N. W. 681; *Lill v. Chicago,* 29 Ill. 31; *De Haven v. Berendes,* 137 Cal. 178, 67 Pac. 786; *Port Dodge Elec. L. & P. Co. v. Fort Dodge,* 115 Iowa 568, 89 N. W. 7; *Owens v. Marion,* 127 Iowa 469, 103 N. W. 381.

We think this case falls within the latter class. As soon as it was finally determined by the judgment of the court in the condemnation proceeding that the property of the appellant was damaged over and above all local and special benefits arising from the proposed improvement, the right and power to levy special assessment against the property to defray the expenses of that improvement was gone, and the subsequent attempt on the part of the city to assess the property, notwithstanding the previous verdict and judgment, was mere usurpation, and beyond its jurisdiction. When once judicially determined that the property of the appellant was damaged and not benefited by the improvement, it had a right to rest on that adjudication and was not compelled to take further notice of what the legislative department of the city might thereafter do or attempt to do.

The judgment of the court below is reversed, and the cause remanded with directions to overrule the demurrer and proceed to judgment in accordance with this opinion.

FULLERTON, ROOT, and DUNBAR, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

[Nos. 7498, 7499, 7500, 7501. Decided November 14, 1908.]

TERENCE O'BRIEN, *as Administrator, Respondent*, v. GEORGE A. WILSON *et al., Appellants.*[1]

ADVERSE POSSESSION—PUBLIC LANDS—LIMITATIONS. Title to school lands cannot be acquired by adverse possession, and the territorial act, Bal. Code, § 4807, providing that limitations prescribed for the commencement of actions shall run against the state, county or other public corporations, so far as the same gives title to school lands by adverse possession, is repugnant to the state constitution and to the acts of Congress providing that school lands shall not be disposed of except at public auction for full market value paid or secured to the state.

Appeal from a judgment of the superior court for King county, Yakey, J., entered January 28, 1908, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, upon stipulated facts and the opening statement of counsel, in an action of ejectment. Affirmed.

Jay C. Allen, for appellants, contended, *inter alia*, that although possession be held in subordination to the title of the United States, still it may be adverse as to all others. *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199; *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914; *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755; *Francoeur v. Newhouse*, 43 Fed. 236; *Hayes v. Martin*, 45 Cal. 559; *Johnson v. Brown*, 33 Wash. 588, 74 Pac. 677; *McManus v. O'Sullivan*, 48 Cal. 7; *Converse v. Ringer*, 6 Tex. Civ. App. 51, 24 S. W. 705; *Longley v. Warren*, 11 Tex. Civ. App. 269, 33 S. W. 304; *Northern Pac. R. Co. v. Kranich*, 52 Fed. 911; *Anderson v. Burnham*, 52 Kan. 454, 34 Pac. 1056. Although the lands were school lands, the statute of limitation ran against the state. *Hibberd v. Slack*, 84 Fed. 571; *Partee v. Thomas*, 11 Fed. 769; *Chase v. Cartright*, 53 Ark. 358, 14 S. W. 90, 22 Am. St. 207; *McCartin's Exr's. v. Perry's Ex'r.*, 39 N. J. Eq. 198; *Trimble*

[1]Reported in 97 Pac. 1115.

v. Woodhead, 102 U. S. 649, 26 L. Ed. 291; *McLeren v. Benton*, 73 Cal. 329, 14 Pac. 879, 2 Am. St. 814; *Mathews v. Durkee*, 34 Fla. 559, 16 South. 411; *Schneider v. Hutchinson*, 35 Ore. 253, 57 Pac. 324, 76 Am. St. 474; *Wyatt v. Tisdale*, 97 Ala. 594, 12 South. 233; *Snyder v. Snover*, 56 N. J. L. 20, 27 Atl. 1013; *School Directors v. Goerges*, 50 Mo. 194; *Hargis v. Township*, 29 Ind. 70; *Northern Pac. R. Co. v. Spokane*, 45 Wash. 229, 88 Pac. 135. The defense of the statutes of limitation is a meritorious defense and will not be given a forced construction to defeat one claiming its benefit. *Ward v. Huggins*, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285. A judgment on the merits, based upon the opening statement, is justified only when facts are admitted from which it affirmatively appears that there is no defense. *Redding v. Puget Sound Iron & Steel Works*, 36 Wash. 642, 79 Pac. 308; *Brooks v. McCabe & Hamilton*, 39 Wash. 62, 80 Pac. 1004.

Samuel H. Piles, George Donworth, James B. Howe, C. H. Farrell, and *Hughes, McMicken, Dovell & Ramsey (Shank & Smith*, of counsel), for respondents. The claim to and entry on the lands under a mistaken belief that they were public lands, would not work a disseizen of the true owner. *Yesler Estate v. Holmes*, 39 Wash. 34, 80 Pac. 851; *McDaniel v. Sloss Iron & Steel Co.*, (Ala.), 44 South. 705; *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120; *Norton v. Collins*, 1 Tex. Civ. App. 272, 20 S. W. 1113; *Blum Land Co. v. Rogers*, 11 Tex. Civ. App. 184, 32 S. W. 713. The legislature has no power to dispose of public lands by the enactment of a statute of limitations or otherwise. Enabling Act, § 11; Constitution, art. 16, § 1; *Montana v. Lee*, 2 Mont. 124; *Vansickle v. Haines*, 7 Nev. 249; *King v. Thomas*, 6 Mont. 409, 12 Pac. 865; *Barkley v. United States*, 3 Wash. Ter. 522, 19 Pac. 36; *Northern Pac. R. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044; *Northern Pac. R. Co. v. Ely*, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. Ed. 639;

Murtaugh v. Chicago etc. R. Co., 102 Minn. 52, 112 N. W. 860, 120 Am. St. 609.

RUDKIN, J.—On the 24th day of May, 1870, the commissioners of King county on behalf of the Territory of Washington selected the land now in controversy as lieu school land, under the act of Congress approved March 2, 1853, entitled, "An act to establish the territorial government of Washington Territory," and the supplemental act of February 26, 1859, entitled, "An act to authorize settlers upon sixteenth and thirty-sixth sections, who settled before the surveys of the public lands, to preempt their settlements." This selection was approved by the secretary of the treasury under date of January 27th, 1872, and by the secretary of the interior on the 4th day of May, 1895. On the 28th day of March, 1896, the land was duly and regularly offered for sale by the state at public auction, in conformity to the laws of the United States and the constitution and laws of the state, and one Thomas Prosch became the purchaser. The sale was regularly approved and confirmed, and the state executed its deed or patent to the purchaser under date of July 25, 1896. On September 5, 1896, Prosch and wife conveyed to John Sullivan, since deceased, and the plaintiff is the administrator of the latter's estate. This action was instituted by the administrator to recover possession of the property and the rents, issues and profits thereof. The complaint was filed February 15, 1906. The defendants pleaded title by adverse possession. At the commencement of the trial, the foregoing facts and others were stipulated, and upon the stipulated facts and the opening statement of counsel, a verdict was directed in favor of the plaintiff. From the judgment entered on this verdict, the present appeal is prosecuted.

We deem it unnecessary to refer to the stipulation of the parties or to the opening statement of counsel further than to say that, for the purposes of this appeal, it will be conceded that the appellants held the land adversely to the respondent

and his predecessors in interest for more than ten years prior to the repeal of Bal. Code, § 4807 (P. C. § 291), which provides that, "The limitations prescribed in this chapter shall apply to actions brought in the name of the state or any county or other public corporation therein, or for its benefit, in the same manner as to actions between private parties;" and that the appellants have acquired title by adverse possession, if, as a matter of law, title to school lands of the state can be acquired in that way.

By § 10 of the enabling act there was granted to the state sections sixteen and thirty-six in every township, and where such sections or any part thereof had been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto in legal subdivisions of not less than one quarter section, and as contiguous as may be to the sections in lieu of which the same were taken, were granted in lieu of the lands so sold or disposed of. Section 11 of the same act provides as follows:

"That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislature may prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Sections 1 and 2 of art. 16 of the Constitution, provides as follows:

"Sec. 1. All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands

which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

"Sec. 2. None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; and the value thereof, less the improvements, shall, before any sale, be appraised by a board of appraisers, to be provided by law. The terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of improvements thereon shall be excluded: Provided, That the sale of all school and university land heretofore made by the commissioners of any county or the university commissioners, when the purchase price has been paid in good faith, may be confirmed by the legislature."

Section 4807, Bal. Code, under which the appellants claim by adverse possession, was enacted by the territorial legislature long prior to the admission of the state, and was in force in the state only by virtue of section 2 of art. 27 of the Constitution, which provides that, "All laws now in force in the Territory of Washington which are not repugnant to this constitution shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature." If § 4807 should be construed to give title to school lands by adverse possession, in our opinion, it is repugnant to the act of Congress and the sections of the constitution above quoted.

This question was fully considered by the supreme court of Minnesota in *Murtaugh v. Chicago etc. R. Co.*, 102 Minn. 52, 112 N. W. 860, 120 Am. St. 609, where the statute of limitations of that state as applied to state school lands was construed. In holding that the statute of limitations had no application to such lands, the court said:

"The state accepted the trust, and by its Constitution solemnly covenanted with the United States to apply the granted lands to the sole use of its schools according to the purpose

of the grant, and prohibited the sale of any portion of the granted land except at public sale. Such being the nature of the title of the state to its school lands, it is unthinkable that the legislature intended, by section 12, c. 66, G. S. 1866, and later acts amending it, to provide a way whereby the trust as to any of the school lands might be defeated, and title thereto acquired by adverse possession, contrary to the mandate of the Constitution that title thereto could only be obtained by a public sale thereof.

"The decision in the case of *Northern Pacific Railway Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044, is an interesting and authoritative one. In that case the railway company brought ejectment to recover from the defendant a portion of its right of way, to which the defendant claimed title by adverse possession under the statute of limitations of this state. 84 Minn. 152, 86 N. W. 1007, 87 Am. St. Rep. 342. The Supreme Court of the United States held that, although the plaintiff's right of way, granted to it by the United States, was amenable to the police power of the state, yet an individual could not acquire title to any portion thereof by adverse possession under the statute of limitations of the state. In its opinion the court, after stating that the grant of the right of way was for a specific purpose, said: 'This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use would be to allow that to be done by indirection which could not be done directly.'

"We are, then, of the opinion that, if the statute under consideration must be construed as authorizing the acquisition of title to the school lands of the state by adverse possession, it violates in this respect, not only the terms of the grant, but also the Constitution of the state. We are, however, of the opinion that the statute fairly may be given a construction which is consistent with the terms of the school land grant and the provisions of the state Constitution applicable thereto. If the statute be read in connection with the general and well-understood rule of law that title to public lands cannot be acquired by adverse possession, the history of our school land grant, the nature of the title of the state to its school lands, and the mandates of our Constitution with reference to them,

it is clear upon the face of the statute that the legislature did not intend to provide for the acquisition of the title to school lands by adverse possession. We accordingly hold that title to lands granted to the state of Minnesota for the use of its schools by the United States cannot be acquired by adverse possession, as against the state."

To the same effect, see: *Scofield v. Schaeffer* (Minn.), 116 N. W. 210; *State v. Tanner*, 73 Neb. 104, 102 N. W. 235. See, also, *Northern Pac. R. Co. v. Ely*, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. Ed. 639. In opposition to this case the appellants cite *Schneider v. Hutchinson*, 35 Ore. 253, 57 Pac. 324, 76 Am. St. 474, from the supreme court of Oregon, where it was held that title to school lands of that state might be acquired by adverse possession. There was no limitation on the power of alienation in the act of February 24, 1859, admitting Oregon into the Union, or in the Oregon constitution such as are found in our enabling act, and in the constitution of this state. For this reason the decision is not in point. The same is true of the cases cited from Missouri and Indiana. *School Directors v. Goerges*, 50 Mo. 194; *Hargis v. Congressional Township*, 29 Ind. 70. In the language of the supreme court of the United States:

"This being the nature of the title to the land granted for the special purposes named, it is evident that to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any proportion thereof upon an individual for his private use would be to allow that to be done by indirection which could not be done directly;"

and to permit title to school lands in this state to be acquired indirectly by adverse possession would be repugnant to the laws of the United States and the constitution of the state.

The judgment of the court below is therefore affirmed.

The judgments in the following named cases, submitted on the same briefs, are likewise affirmed; viz., Terence O'Brien, as administrator, v. George W. Britain et al.; E. B. Cox In-

vestment Company v. George W. Britain et al.; and M. Cecelia Allen v. George W. Britain et al.

FULLERTON, CROW, and MOUNT, JJ., concur.

HADLEY, C. J., and DUNBAR, J., took no part.

[No. 7497. Decided November 14, 1908.]

THE STATE OF WASHINGTON *et al.*, *Respondents*, v. TELLEF A. JENSEN *et al.*, *Appellants*.[1]

APPEAL—REVIEW—HARMLESS ERROR. Error in rulings relating to the pleadings is not prejudicial where the case was finally submitted on an agreed statement of facts.

Appeal from a judgment of the superior court for King county, Morris, J., entered May 7, 1908, in favor of the plaintiffs, upon stipulated facts, in an action of ejectment and to quiet title. Affirmed.

J. C. Allen, for appellants.

Bausman & Kelleher, for respondents.

PER CURIAM.—The decision of the principal question presented by this appeal is controlled by the decision in *O'Brien v. Wilson*, *ante* p. 52, 97 Pac. 1115. In addition to the question there decided, error is here assigned in overruling certain motions and demurrers directed against the complaint. Inasmuch as the case was finally submitted to the court on an agreed statement of facts, which practically superseded the pleadings, we think the motions and demurrers were waived. In any event the rulings complained of were not prejudicial. The judgment is therefore affirmed.

[1]Reported in 97 Pac. 1117.

[No. 7529. Decided November 14, 1908.]

H. S. JAMES, *Appellant*, v. MARY LUCETTA JAMES *et al.*, *Respondents*.[1]

DIVORCE—PROPERTY RIGHTS AFTER DIVORCE—HUSBAND AND WIFE—SEPARATE AND COMMUNITY PROPERTY. Where a decree of divorce did not determine the rights of the parties in and to their real estate, the separate property of the husband becomes his individual property after divorce, and the community property becomes their joint property.

PUBLIC LANDS—TITLE UNDER TIMBER ACT—HUSBAND AND WIFE—SEPARATE ESTATE—RULE OF PROPERTY—STARE DECISIS. The decision of the supreme court made fifteen years ago, that property acquired by a married man under the timber and stone act is his separate estate is a rule of property in this state to which the doctrine of *stare decisis* applies in all its vigor.

SAME. The rule that property acquired under the timber and stone act is the separate property of the patentee is not affected by the fact that community property was used in its purchase; and it does not rest upon estoppel; nor would the title be affected by a claim of a divorced wife to community funds used in its purchase.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 21, 1908, upon findings in favor of the defendant, in an action to determine the right to proceeds of a sale of real property. Reversed.

W. B. Osbourn and *Hudson & Holt*, for appellant.

Titlow & Huffer, for respondent, contended, *inter alia*, that the doctrine of *stare decisis* does not apply except to decisions of courts of last resort as to the question involved. *Adams v. Church*, 193 U. S. 510, 24 Sup. Ct. 512, 48 L. Ed. 769; *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272; *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429; *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *Washougal & La Camas Transp. Co. v. Dalles, Portland & A. Nav. Co.*, 27 Wash. 490, 68 Pac. 74;

[1]Reported in 97 Pac. 1113.

First Nat. Bank v. Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. 885; *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1, 59 Pac. 607, 83 Am. St. 17, 50 L. R. A. 209. The Supreme Court of the United States has since placed a different construction on the timber and stone act. *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; *Brown v. Chicago etc. R. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771. The timber claim was, or at least the proceeds of the sale were, community property. *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *Hall v. Hall*, 41 Wash. 186, 83 Pac. 108, 111 Am. St. 1016; *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. 912; *Northern Pac. R. Co. v. Kindred*, 14 Fed. 77; 1 Am. & Eng. Ency. Law (2d ed.), 1072. Appellant should be compelled to do equity by accounting for the profits arising from his unauthorized investment of the community trust funds committed to his charge. 1 Pomeroy, Equity Jurisprudence (3d ed.), §§ 386, 389; *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398. The character of the earnings, whether separate or community property, earned while one is temporarily sojourning in a foreign jurisdiction, is fixed by the laws of this state. 1 Wharton, Conflict of Laws (3d ed.), p. 409, § 192a; 1 Story, Conflict of Laws (1st ed.), § 187.

RUDKIN, J.—The plaintiff H. S. James and the defendant Mary Lucetta James intermarried on the 14th day of January, 1891, and remained husband and wife until the 29th day of June, 1906. During the existence of the marriage relation, the husband and wife acquired an undivided one-half interest in a quarter section of land in Pierce county, which is conceded to have been community property, and the husband acquired an additional quarter section from the United States under the timber and stone act, which he claimed as his separate property. On the 29th day of June, 1906, the parties were divorced by the superior court of Pierce county, at the

suit of the husband. Their property rights were not brought before the divorce court by either complaint or answer, and no reference was made thereto in the decree. Some time after the divorce, the property above described was sold, but the defendant Mary Lucetta James refused to sign the deed to the purchaser, unless she was paid one-half of the net proceeds of the sale. It was thereupon agreed that the purchase price arising from the sale should be deposited in the defendant bank, in the joint names of the plaintiff H. S. James and the defendant Mary Lucetta James, and that their rights in the fund should be thereafter adjusted and determined. Pursuant to this agreement the property was conveyed, and the net proceeds of the sale of the two claims, amounting to the sum of $3,978.50, were deposited in the defendant bank.

This action was thereafter instituted by H. S. James to determine the rights and claims of the respective parties to the fund thus deposited. The court below found that the timber claim, as well as the other property, was the community property of the two spouses, and made an equal division of the fund between them. From this judgment the plaintiff has appealed.

The principal question involved on the appeal is the character of the land acquired under the timber and stone act. In other words, did it become the separate property of the entryman or the community property of the entryman and his wife. If it became the separate property of the husband at the time of its acquisition, it remains his separate property still; for, as said by this court in *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588:

"Where no disposition of the property rights of the parties is made by the divorce court, the separate property of the husband prior to the divorce becomes his individual property after divorce, the separate property of the wife becomes her individual property, and from the necessities of the case, their joint or community property must become common property. After the divorce there is no community, and in the nature of things there can be no community property."

In *Gardner v. Port Blakely Mill Co.*, 8 Wash. 1, 35 Pac. 402, this court held that land acquired by a married man, under the act of Congress providing for the sale of timber lands, is his separate property, and can be alienated without the consent of the wife. The reasons assigned for this conclusion were that husband and wife are each permitted to make entry of 160 acres under the provisions of the act; and that the entryman is required by § 2 of the act to make oath,

"That deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself."

This decision was rendered nearly fifteen years ago, and has become a rule of property in this state, and should not be overruled or departed from at this late day.

"If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law." 1 Kent, Commentaries (14th ed.), p. 476.

"It will of course sometimes happen that a court will find a former decision so unfounded in law, so unreasonable in its deductions, or so mischievous in its consequences, as to feel compelled to disregard it. Before doing so, however, it will be well to consider whether the point involved is such as to have become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by any change; for in such a case it may be better that the correction of the error be left to the legislature, which can control its actions so as to make it prospective only, and thus prevent unjust consequences." Cooley, Constitutional Limitations (7th ed.), p. 86.

The respondent contends that the doctrine of *stare decisis* has no application here for three reasons: First, because it did not appear in the *Gardner* case that community funds were used in the purchase of the timber claim; second, because the decision was based on the doctrine of estoppel; and third, because the supreme court of the United States has since placed a different construction on the timber and stone act.

The first reason assigned is without merit. If there was no proof as to the community or separate character of the purchase money, the presumption that community funds were used would necessarily prevail. Furthermore, the court said: "Admitting that the money so used was the property of the community, the situation would not be altered as to the ownership of the legal title to the land."

The second reason assigned is equally without merit. If the *Gardner* case were cited in support of the doctrine of estoppel, it might be contended with far greater reason that the decision was based on other grounds, for in the course of the opinion, the court said: "It is contended by the respondent that this land was the separate property of William Cadwell [the entryman] and this is the principal question in the case."

Without conceding the soundness of the third reason assigned, we do not think it is well founded in fact. That both husband and wife may make a timber and stone entry is not denied, nor can it be denied that the entryman is required

to take the oath required by § 2 of the act. There is nothing in the opinion of the supreme court of the United States in the case of *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, cited by the respondent, in conflict with the views expressed by this court in the *Gardner* case. In the *Williamson* case the court held that the land department had no authority to exact an affidavit from the entryman, *at the time of final proof*, to the effect that he did not apply to purchase the land on speculation, and that he had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever by which the title acquired should inure in whole or in part to the benefit of any person except himself; and that perjury could not be assigned on such an affidavit, though false. In that case the court expressly conceded that such an affidavit was required of the entryman *at the time of filing*, under §2 of the act, and that a false oath made at that time constituted perjury. No reference whatever was made to the final proof affidavit in the *Gardner* case, and the decision in no manner hinged upon that affidavit.

We are therefore of the opinion that the doctrine of *stare decisis* applies to the decision in the *Gardner* case in all its vigor, and that the inconvenience which would result in a departure from the rule there established at this time would far outweigh any injury or inconvenience that may result from an erroneous decision of this, or any other individual case, arising under the timber and stone act.

Again, it is contended that the respondent has some claim to or interest in the timber land, because community funds were used in its purchase. Such claim, however, does not constitute an interest in or lien upon the property itself, and we cannot take cognizance of it, unless we now undertake to adjust the property rights of the parties as they should have been adjusted at the time of the divorce. It might be claimed, with an equal show of reason, that the appellant has some

claim or equity against the respondent because community funds were used in the purchase of the timber claim entered by her in the state of Oregon.

We are therefore of the opinion that the net proceeds arising from the sale of the timber claim are the separate and individual property of the appellant, and that he is entitled to a decree awarding the same to him; that the net proceeds of the sale of the remaining land is the joint property of the appellant and the respondent, and should be equally divided between them; and the judgment is reversed with directions to enter a decree accordingly.

FULLERTON, MOUNT, and DUNBAR, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

ON REHEARING.

[Decided January 6, 1909.]

RUDKIN, J.—Both parties to this appeal have petitioned for a rehearing, but the only ground of the respective petitions which we deem it necessary to consider is the claim that the mandate of this court is not sufficiently specific to enable the court below to enter a proper decree. When the appellant, H. S. James, and the respondent, Mary Lucetta James, were divorced without any settlement or adjustment of their property rights, their community property became common property, their separate property remained separate, their community indebtedness became their joint indebtedness, and their separate indebtedness remained separate. In entering its final decree the court below will deduct the joint indebtedness of the parties from the proceeds of the sale of their joint property and divide the residue between them share and share alike. The proceeds of the sale of the separate property of the appellant will be awarded to him. It seemed to us that this conclusion followed as a matter of course from what was said in the original opinion, but to avoid any possibility of further controversy or litigation we have deemed

it best to settle the matter finally at this time. With this explanation the petitions for rehearing are denied.

HADLEY, C. J., FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7576. Decided November 14, 1908.]

SAMUEL N. GUSTIN *et al.*, *Appellants*, v. LAURA S. CROCKETT *et al.*, *Respondents*.[1]

CANCELLATION OF INSTRUMENTS—GROUNDS—FRAUD—WILFUL VIOLATION OF AGREEMENT FOR SUPPORT — EQUITY—PLEADINGS—RELIEF GRANTED. Where a daughter-in-law and son advanced the money to enable the son's parents to make improvements and complete the purchase of lots, which were deeded to the daughter-in-law under an agreement that the same were to belong to her after the death of the old people, who were to be allowed to live thereon during the remainder of their lives, but who were subsequently evicted by the daughter-in-law, equity will, upon the ground of presumed fraud in the first instance, decree a rescission of the contract upon repayment of the advances and interest, where the old people sought such relief in an action to declare the deed a mortgage and to redeem therefrom, although there was no proof of the allegation that the deed was intended as a mortgage; wilful violation of such an agreement being sufficient ground for cancellation of the deed.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 30, 1908, in favor of the defendants, dismissing an action to reform a deed as a mortgage, and to redeem therefrom, after a trial on the merits before the court without a jury. Reversed.

Parker & Brown, for appellants.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for respondent Crockett.

RUDKIN, J.—In the month of June, 1900, the plaintiffs entered into a contract with C. D. Hillman for the purchase of the seven lots now in controversy. The contract price was

[1]Reported in 97 Pac. 1091.

$325, ten dollars of which was paid when the contract of purchase was made. The lots when purchased were covered with stumps, logs and brush, were wholly unimproved, and the plaintiffs were practically without means. The defendant Laura S. Crockett was at one time the wife of a son of the plaintiffs, but prior to the transactions here complained of the son died, and the widow became the wife of Hugh B. Crockett, since deceased. The Crocketts advanced money to the plaintiffs from time to time to enable them to improve the property and make payments under their contract.

About the month of May, 1901, the plaintiffs were endeavoring to negotiate a loan on the property to pay off the balance due on the purchase price, and the plaintiff, Samuel N. Gustin informed the defendant Laura S. Crockett of their intentions in that regard. She advised him not to mortgage the property, that he was growing old and infirm and might lose the property by foreclosure; that she and her husband would advance the necessary funds to pay the balance due on the purchase price, and that the Gustins could deed the property to her and continue to live there during the remainder of their lives, after which the property would come to her. After talking the matter over, the plaintiffs assented to this arrangement, the property was deeded to the defendant Laura S. Crockett, and advances were made by the Crocketts to the amount of $470 in all. The plaintiffs continued to live on the property about four or five years after the execution and delivery of this deed, made permanent improvements on the lots of the value of about $1,000, and paid taxes from 1900 to 1903 inclusive.

On October 14, 1903, the defendant Laura S. Crockett deeded the property to her husband, Hugh B. Crockett, and on the 19th day of April, 1904, the Crocketts mortgaged the property to the defendant Janisch to secure a loan of $650. In the latter part of the year 1905 and the early part of the year 1906, the plaintiffs were twice ejected from the property under writs of restitution issued out of the superior court of

King county in unlawful detainer proceedings at the suit of the Crocketts, and this action was thereupon instituted to declare the deed from the plaintiffs to the Crocketts a mortgage, and praying that the plaintiffs might be permitted to redeem, and for general relief.

The action was tried before the court without a jury. No findings of fact or conclusions of law were made, but soon after the case was submitted, the court announced its decision setting forth the facts as we have detailed them, and directed a judgment for the plaintiffs. Findings were thereafter submitted, but the court then concluded that the plaintiffs were not entitled to the relief demanded, under the allegations of their complaint, and dismissed the action. From this judgment the plaintiffs have appealed.

In its final disposition of the case, the court below held: First, that the proofs utterly failed to show that the deed from the appellants to the respondent Laura S. Crockett was given as security or was intended as a mortgage; and second, that the deed could not be cancelled for fraud unless it appeared from the testimony that the respondent Laura S. Crockett intended to defraud the appellants at the time of the execution of the deed; and the court was unable to so find.

In its first conclusion the court was manifestly right, for there is not in the record the slightest testimony tending to show that the deed was given as security or was intended as a mortgage. In fact, the contrary clearly appears from the testimony of the appellants themselves. If the deed cannot be set aside for fraud unless the proofs show that the instrument was fraudulent in its inception, we are not prepared to say that the court was in error; but such, in our opinion, is not the law. The respondent Laura S. Crockett was at one time the daughter-in-law of the appellants, and while that relation had ceased through the death of the son, the relation between them was still one of trust and confidence, and the court so found. The agreement on the part of the respondent Laura S. Crockett and her deceased husband that the appel-

lants should occupy the property during their lives was an integral part of the grant itself, and was in part the consideration for the grant. Where there is a wilful and wrongful violation of such an agreement, a court of equity will grant relief; and as said by the court in *Oard v. Oard*, 59 Ill. 46, and approved in *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559, "If the rescission of the contract cannot be referred to any other head of equity jurisdiction, it would be proper to presume that it was made in the first instance with a fraudulent intent."

This is but the common instance of people who are old and infirm conveying their property to their children, or to others in whom they have trust and confidence, where the consideration for the conveyance is, in whole or in part, an agreement for future support and maintenance. In such cases courts of equity have never failed to rescind the contract and cancel the deed for a wilful violation of the agreement to support and maintain, and they never inquire whether the transaction was fraudulent in its inception or not. The wilful and wrongful violation of the agreement is in and of itself ample ground for the rescission. *Payette v. Ferrier*, 20 Wash. 479, 55 Pac. 629, and cases cited. Nor do we find any difficulty in granting such relief under the allegations of the complaint. The facts are set forth in the complaint substantially as we have stated them, and the allegation that the deed was given as security or was intended as a mortgage is a mere conclusion of the pleader not warranted by the other facts.

The judgment of the court below is therefore reversed, and the case is remanded to that court with directions to cancel and annul the two deeds under which the respondent Laura S. Crockett claims, upon the payment into court of the sum of $470, with legal interest from the date of the advancements made by the respondent Laura S. Crockett and her deceased husband. The money thus paid in will be applied on the mortgage executed by the respondent Laura S. Crockett and her deceased husband to the respondent Janisch, and the court

will so frame its decree as to protect the rights of all concerned.

FULLERTON, CROW, and MOUNT, JJ., concur.

HADLEY, C. J., and DUNBAR, J., took no part.

[No. 7593. Decided November 14, 1908.]

ANNA SULLIVAN *et al.*, *Respondents*, v. THE SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

DEATH—CAUSE OF DEATH—EVIDENCE—RECORDS—CORONER'S INQUEST. The record of a coroner's report of an inquest is not competent evidence in civil actions of the cause of the death.

CARRIERS—NEGLIGENCE—SETTING DOWN PASSENGERS—EVIDENCE—ADMISSIBILITY. In an action for causing the death of an intoxicated passenger by permitting him to alight at a dangerous place, evidence offered by plaintiffs tending to show that the deceased was prevented by the carrier in his attempt to alight at a place where the streets were safe, is inadmissible.

SAME—EVIDENCE—OPINIONS. In an action for causing the death of an intoxicated passenger in permitting him to alight at a dangerous place, evidence that bystanders exclaimed that "it was murder" to allow him to get off there is inadmissible, as the same is only an expression of opinion.

SAME—EVIDENCE OF INTOXICATION. In such an action, evidence that the passenger was muddy and bloody about the face when he got on the car is admissible to show notice of his condition.

TRIAL—MISCONDUCT OF COUNSEL. Reading evidence introduced at a former trial in the argument to the jury is improper unless it was offered in evidence.

SAME. In an action for negligently causing the death of an intoxicated person, it is improper for counsel for the plaintiffs to comment to the jury upon the absence of evidence that the deceased was a drunkard.

SAME—PASSENGERS—INTOXICATION—DEGREE OF CARE—NOTICE OF CONDITIONS. It is error to instruct the jury to the effect that a street car company is bound to exercise reasonable care to ascertain the

[1]Reported in 97 Pac. 1109.

condition of a passenger as to sobriety, and to take precautions for his safety accordingly; as the carrier has a right to assume that he was sober until the contrary appears.

APPEAL—REVIEW—LAW OF CASE. The opinion of the supreme court on a former appeal is the law of the case.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 14, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for the death of a passenger permitted to alight from a street car at a dangerous place while in an intoxicated condition. Reversed.

James B. Howe and *R. G. Sharpe*, for appellant.

John E. Humphries and *George B. Cole*, for respondents.

RUDKIN, J.—This action was instituted by the widow and minor children of David Sullivan, deceased, to recover damages for his death, which is alleged to have been caused by the wrongful act or neglect of the defendant. The case was before this court on a former appeal where a full statement of the facts will be found. *Sullivan v. Seattle Elec. Co.*, 44 Wash. 53, 86 Pac. 786. On a retrial of the action, the plaintiffs had judgment for the sum of $3,000, and the defendant has appealed. In the course of the trial the respondents offered in evidence the report of the deputy coroner to the county auditor, made pursuant to § 6 of the act of March 7, 1891, Laws 1891, page 188, for the purpose of proving the cause of death. The appellant challenged the competency of this report, but its objection was overruled and this ruling is the first error assigned. It was formerly held that the record of a coroner's inquest on a dead body was competent but not conclusive evidence of the cause of death in all civil actions, because it was the result of an inquiry made under competent public authority to ascertain matters of public interest and concern. 1 Greenleaf, § 556. This rule still prevails in a few jurisdictions, but the great

weight of modern authority is against it. *Memphis & C. R. Co. v. Wormack*, 84 Ala. 149, 4 South. 618; *Germania Life Ins. Co. v. Ross-Lewin*, 24 Colo. 43, 51 Pac. 488, 65 Am. St. 215; *In re Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695; *Central R. Co. v. Moore*, 61 Ga. 151; *Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Aetna Life Ins. Co. v. Kaiser*, 115 Ky. 539, 74 S. W. 203; *Wasey v. Travelers' Ins. Co.*, 126 Mich. 119, 85 N. W. 459; *State v. Cecil Co.*, 54 Md. 426; *Louis v. Connecticut Mut. Life Ins. Co.*, 58 App. Div. 137, 68 N. Y. S. 683; *Insurance Co. v. Schmidt*, 40 Ohio St. 112; *Cox v. Royal Tribe*, 42 Ore. 365, 71 Pac. 73, 95 Am. St. 752, 60 L. R. A. 620; *Aetna Life Ins. Co. v. Milward*, 118 Ky. 716, 82 S. W. 364, 68 L. R. A. 285; *Kane v. Supreme Tent, Knights of Maccabees*, 113 Mo. App. 104, 87 S. W. 547; *Boehme v. Sovereign Camp, Woodmen of the World*, 98 Texas 376, 84 S. W. 422; *Kinney v. Brotherhood of American Yoeman*, 15 N. D. 21, 106 N. W. 44; *Chambers v. Modern Woodmen of America*, 18 S. D. 173, 99 N. W. 1107; Wigmore Evidence, § 1671.

The rule excluding such records prevails indiscriminately in actions on insurance policies and in actions to recover damages for death by wrongful act, as will appear from an examination of the cases cited. The reason for the change in the rule is not far to seek.

"By the ancient law, such high credit was given to a coroner's inquest that the judge would not receive a verdict acquitting a person of the death of a man found against the accused by the coroner's inquest, unless the jury finding such acquittal also found what other person did the act, or by what other means the party came to his death. 2 Bac. Abr. Tit. 'Coroner.' This rule does not now obtain anywhere and the natural inquiry is, what remnants of it ought to remain? The inquiry into the cause of death cannot, under our law, in and of itself establish the status of any one or of any property . . . At the ancient common law when the jury found that a person had committed suicide, ignominious burial followed. To this extent the inquest established the status of the deceased, but, under our practice, nothing fol-

lows upon the verdict except in case it is found that a crime has been committed. Why, then, should a stranger to the proceeding be bound by the verdict? Why should it be evidence against a stranger of the cause of his death? We cannot see any well grounded reason why such a verdict be either conclusive or evidence against a stranger to the proceeding." *Wasey v. Insurance Co., supra.*

The reasons for excluding this class of testimony are thus stated by the court in *Germania Life Ins. Co. v. Ross-Lewin, supra:*

"In case of death under suspicious circumstances, or resulting from accident, the rule permitting inquisitions to be used in evidence would result in a race and scramble to secure a favorable coroner's verdict, that would influence, and perhaps control, in case suit should be instituted against life insurance companies upon policies of insurance, and in cases of accidents occurring as the result of negligence on the part of corporations operating railways, street car lines, mining for coal or the precious metals, etc. Law writers, of late, have frequently animadverted upon the carelessness with which such inquests are frequently conducted, and to allow inquisitions to be used in a suit between private parties upon a cause of action growing out of the death of the deceased, as in this case, would be to introduce an element of uncertainty into the practice which, we think, would be contrary to public policy, and pernicious in the extreme; and for this reason we conclude, upon careful consideration, that the safer and better rule is to exclude such inquisitions."

We have thus far considered the report of the coroner as if it were entitled to the same degree of credit as the record of an inquest, because the parties have so treated it, but in our opinion the report does not stand on as high a plane as the formal record. It is simply a report made to the auditor by the coroner as a part of the vital statistics of the state, under the provisions of the act creating the state board of health, and, as said by the court in *Sovereign Camp of W. O. W. v. Grandon*, 64 Neb. 39, 89 N. W. 448:

"It is a mere police regulation, and is not intended for supplying the public at large with information upon which re-

liance may be placed in the business affairs of the community. We do not think the record is of such a character as to entitle it to be received in evidence, as affecting the interest of a party to a litigation."

The respondents offered testimony tending to show that the deceased attempted to get off the car at a point where the streets were graded and level, but was restrained from so doing by the servants of the appellant. This testimony was admitted over objections, but the court afterwards charged the jury that they could only consider it in determining the condition of the deceased. Doubtless the entire conduct of the deceased while he was a passenger on the car might be given in evidence for the purpose of showing his condition and the knowledge that the appellant or its servants had of that condition, but the condition of the streets where the appellant first attempted to leave the car had no bearing upon that question. The jury might well infer from this testimony that the appellant was in the wrong in restraining the deceased from leaving the car at a safe and proper place, and how far this fact may have influenced or entered into the general verdict we do not know. The testimony bearing upon the character of the streets where the deceased attempted to leave the car should have been excluded.

Three witnesses called by the respondents were permitted to testify over objection, that at or about the time the deceased left the car, a woman passenger in the same car, got up or jumped up, and exclaimed, that "it was murder," or "looked like murder," to let the deceased off at that place. The appellant assails the ruling of the court in admitting this testimony on three grounds: first, because the exclamation was not made at the time the deceased left the car; second, because the exclamation was made by a passenger or bystander in no way connected with the principal transaction; and third, because the exclamation was a mere expression of opinion. We will pass over the first two grounds of objection as they are not necessarily involved in this case, and so far as we are at present

advised, will not arise on a retrial. Assuming without deciding that exclamations of a mere bystander, in no manner connected with the principal transaction, are admissible in evidence, yet such exclamations must relate to matters of fact which the party might properly testify to if called as a witness, and not to mere matters of opinion. To hold otherwise would place exclamations above sworn testimony. If the exclamation in question related to the principal transaction at all, it was nothing more than the expression of an opinion on the part of this woman that if a person in the condition of the deceased were permitted to get off the car at that point he would meet his death. It must be perfectly apparent to any one that if called as a witness this woman could give expression to no such opinion, and if her opinion found its way into the records inadvertently it would be forthwith stricken. *Hughes' Adm'r. v. Louisville & N. R. Co.*, 104 Ky. 774, 48 S. W. 671; *Allen v. State*, 111 Ala. 80; *State v. Ramsey*, 48 La. Ann. 1407, 20 South. 904; *Kaelin v. Commonwealth*, 84 Ky. 354, 1 S. W. 594; *De Walt v. Houston etc. R. Co.*, 22 Tex. Civ. App. 403, 55 S. W. 534.

One of the witnesses for the respondents was permitted to testify over objection that when the deceased got on the car he was all muddy and bloody about the face. We think this testimony had some tendency to show the condition of the deceased and to attract the attention of the servants of the appellant to his condition, and that the testimony was proper for that purpose.

It is next objected that counsel for the respondents was permitted to read portions of the testimony taken at another trial in his argument to the jury. Of course, it would be improper to permit such testimony to be read unless it was also offered at the second trial, but the question will not arise again and we will not further discuss or consider it. In his closing argument to the jury counsel for the respondent further said concerning the deceased: "He was a man of good habits gentlemen. If he had not been, they would have

raked this land over with a fine tooth comb to show this man was a drunkard." The general character of the deceased was not an issue in the case; it would not have been competent for the appellant to offer proof of his general character for sobriety, and counsel should not have been permitted to refer to the absence of such testimony in argument.

The following instruction to the jury was duly excepted to, and the giving of the instruction is assigned as error:

"If you find from the evidence that the said David Sullivan was in such a state of intoxication as to be unable to care for himself and that the servants of the defendant in charge of the car upon which he was a passenger knew that he was in such condition, *or by the exercise of reasonable care, that is, such care as a reasonably prudent person, engaged in like occupation would ordinarily exercise under similar circumstances to ascertain the condition of a passenger, should have known that he was in such an intoxicated condition as to be unable to care for himself*, then it was the duty of the servant of the defendant company operating said car to take such precaution for his safety as his condition required under all the surrounding circumstances."

This instruction is erroneous. A conductor has a right to presume that every passenger entering his car is both sane and sober until he has actual notice to the contrary. He is not compelled to make a mental or physical examination to ascertain his condition, and the doctrine of imputed or implied notice has no application to such a case.

"If a passenger voluntarily becomes intoxicated, the law does not impose the duty on the common carrier to place a guard over such passenger to prevent him from injuring himself in a place of danger. If a passenger, however, while in such condition as averred, does place himself in a place of peril, then before the company can be held liable if an injury results therefrom it must be proven that the agents or servants operating the train knew that fact—not that they should have known it because of any duty by law imposed on the company to watch such passenger—but the actual fact of such perilous position must be brought home to

the knowledge of the servants operating such train. The company was not bound to have its servants at the rear platform of the coach on which Carr was sitting at Mulkeytown for the reason that it owed him no such duty, as he had not indicated any intention of alighting there, and in fact he did not intend to do so." *St. Louis etc. R. Co. v. Carr*, 47 Ill. App. 353.

"We think, however, if a passenger is in need of special assistance, either from sickness or other misfortune, and this fact is known to the employees of the carrier, it is their duty to render it; but they are not required to anticipate such wants or needs. The trial court therefore erred by inserting into the instructions given to the jury the idea that it was incumbent upon the employees of the appellant to observe the condition of the passengers in order to see whether or not they needed assistance. This thought is embraced in the use of the expression 'or was apparent' in the instructions after stating the duty of the employees of appellant if appellee's health was known to them. As said before, if the employees of the railroad knew that the appellee was in feeble health, and needed assistance, it was their duty to render her such reasonable help as lay in their power in order that she might alight from the car in safety. But they owed her no duty of observation to ascertain her condition, and therefore the expression 'or was apparent' should have been omitted." *Illinois Cent. R. Co. v. Cruse*, 29 Ky. Law 914, 96 S. W. 821.

See also, *Strand v. Chicago etc. R. Co.*, 67 Mich. 380, 34 N. W. 712.

Other errors are assigned in the giving and refusing of instructions, but we think these questions are fully covered by our former opinion. As there stated, the issues in this case are, first, was the deceased intoxicated; second, did the servants of the appellant have actual notice of his condition; third, was the place where the deceased was permitted to alight from the car a reasonably safe place to land a person in his condition; and fourth, was the act of the appellant or its servants in suffering and permitting the deceased to leave the car at that particular time and place and in his then condition the natural and approximate cause of his death. If the jury

should find all of these issues in favor of the respondents they would be entitled to a verdict, and the mere fact that the deceased fell into the lake from the platform or trestle by reason of his intoxication—if he did so fall—would not of itself preclude a recovery, as the appellant was bound to anticipate such negligence on his part. Such we believe to be the law as laid down in the former opinion, and that opinion is the law of this case.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

FULLERTON, DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 7730. Decided November 14, 1908.]

THE STATE OF WASHINGTON, *on the Relation of the Socialist Labor Party, Plaintiff*, v. SAMUEL H. NICHOLS, *Secretary of State, Defendant*.[1]

ELECTIONS—CERTIFYING NOMINATIONS—MANDAMUS—REASONABLENESS OF TIME. A writ of mandate to compel the secretary of state to certify certain nominations to the county auditors, applied for less than one week prior to the election and when the tickets had already been certified and most of them printed, will be denied when no reason is given why the nominations were not filed and tendered within the time required by law, the time not being reasonable.

Original application filed in the supreme court October 26, 1908, for a writ of mandate to compel the secretary of state to certify certain nominations. Denied.

A. A. Booth, for petitioner.

PER CURIAM.—A certificate of nomination of the candidates of the Socialist Labor Party was presented to the secretary of state for filing on the 21st day of September, 1908. On the 22d day of September, 1908, the secretary returned the certificate with his refusal to file the same, unless the filing

[1]Reported in 97 Pac. 1087.

fees prescribed by the direct primary law were first paid. Some time thereafter, the exact date not appearing, the secretary was again requested to file the certificate in so far as the same applied to the presidential electors therein named. Under date of October 18, 1908, the secretary again refused to file or certify the nominations, for the reason that the ticket had already been certified to the different county auditors throughout the state, and the greater portions thereof had already been printed. On the afternoon of October 27, 1908, or less than one week before the opening of the polls at the general election, an application was made to this court for a writ of mandate against the secretary requiring him to certify the names of the presidential electors as requested. The secretary of state is entitled under the law to reasonable notice of an application of this kind; and, should the writ be granted, after the ticket is certified to the various county auditors it must be printed and distributed to the numerous polling places throughout the state prior to the morning of election. It is apparent to this court that all this could not be accomplished in the short interval between the date of the application and the date of election. No reason was assigned why the nominations were not filed or tendered within the time allowed by law, and without any inquiry into the merits of the application, the same should be denied. It is so ordered.

[No. 6769. Decided November 14, 1908.]

W. C. LABEE, *Respondent*, v. SULTAN LOGGING COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—PRIMA FACIE CASE. The doctrine of *res ipsa loquitur* may properly be applied to the relation of master and servant, where the facts eliminate blame on the part of the servant; the contrary rule being unreasonable and unjust in that it gives the master the benefit of the presumption in every case and the servant in none.

SAME. The doctrine of *res ipsa loquitur* is not confined to cases where one is the insurer of another's safety.

Appeal from an order of the superior court for Snohomish county, Black, J., entered January 12, 1907, setting aside a nonsuit and granting a new trial, in an action for personal injuries sustained by an employee through the breaking of a cable. Affirmed.

Graves, Palmer & Murphy (*C. H. Winders*, of counsel), for appellant.

Roney & Loveless and *Hathaway & Alston*, for respondent.

ON REHEARING.

FULLERTON, J.—This case is before us on rehearing. For the former opinion see *LaBee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560, where will be found a statement of the issues involved. In the petition for rehearing, as well as in the oral argument made at bar, it is insisted that the court erred in applying the doctrine of *res ipsa loquitur* to a case between master and servant. It is contended that this doctrine is applicable only "to cases between carrier and passenger, and other cases wherein the person sought to be held occupies the relation of insurer," but is never applied to a case where the servant sues the master for negligence causing personal injuries. The weight of authority seems to

[1]Reported in 97 Pac. 1104.

support counsel's contention in so far as they contend that the doctrine is not applicable to cases between master and servant. The Federal cases uniformly so hold, and in the majority of the states the same rule obtains. See *Northern Pac. R. Co. v. Dixon*, 139 Fed. 737, and the cases there collected.

But the question being a new one in this state we have felt ourselves at liberty to inquire into the reasons for the rule, and to discard it if we found the reasons given to maintain it unsatisfactory. These reasons are perhaps as well stated in the case cited as in any other. It is there said that the doctrine is inapplicable to cases between master and servant brought to recover damages for negligence,

"Because there are many possible causes of accidents during service, the risk of some of which, such as the negligence and other ordinary dangers of the work the servant assumes, while for the risk of others, such as the lack of ordinary care to construct or keep in repair the machinery or place of work, the master is responsible. The mere happening of an accident which injures a servant fails to indicate whether it resulted from one cause the risk of which is the servant's, or for one of those the risk of which is the master's; and for this reason it raises no presumption that it was caused by the negligence of the latter."

In other words, the reason is that because in some instances it is difficult to determine from the facts shown whether the blame is the master's or the servant's, and the master shall have the benefit of the presumption in all cases and the servant in none. It has seemed to us that this reasoning is not only unsound, but is grossly unfair to the servant. Where the facts of the case are such as to eliminate blame on the part of the servant or his fellow servants, but show *prima facie* neglect on the part of some one, we think the master should be put to his proofs to show that the blame is not his, just the same as he would be were the injury to a stranger. Such a rule casts the burden upon the person who is in a position to know the facts, and who can make the proofs by direct

and positive evidence, while the rule contended for by the appellant compels the resort to indirect and circumstantial evidence.

In this case, the servant made proofs to the effect that the master furnished him with an instrument with which to do his work and directed him to do it in a particular manner; that he took the instrument and proceeded to perform the work in the manner directed, when the instrument gave way and injured him; and we think it no hardship to cast on the master the burden of showing that the instrument was suitable for the purposes for which it was intended, and that any defect therein was unknown to the master, and by reasonable diligence could not have been discovered by him. This is not holding, as the appellant seems to argue, that a presumption of negligence arises from the mere fact of injury. The injury itself proves nothing: it may have been the fault of the servant. But in a case where the servant eliminates any fault on his part by showing that the injury was caused by the giving way of an instrumentality furnished him with which to work, while he was using it for the purposes intended, and in the manner directed, he shows that the fault is in the instrumentality itself for which the master is *prima facie* responsible. The case differs from an ordinary case of injury only in the manner of proof. In each case, of course, a *prima facie* case of negligence against the master must be made out, but in the one it is made out by showing the injury, and eliminating negligence on the part of the servant and his fellow servants, while in the other it is made out by direct evidence of negligence on the part of the master.

Counsel make another contention it may be well to notice. The paragraph we have quoted in our statement of the contentions made by counsel is from their petition for rehearing. In it, it will be observed, counsel assume that the doctrine of *res ipsa loquitur* is applied only in those cases where the person sought to be held occupies the relation of insurer to the person injured. The illustration given is that of car-

rier and passenger. But the assumption that a carrier is an insurer of the safety of its passengers is against the great weight of authority, even if it is now the rule in any jurisdiction. Certainly this court has never so held. On the contrary, in our own reports, and the reports generally, can be found cases where the carrier has successfully defended against its liability for injuries suffered by its passengers. If it was an insurer, its defense would have been confined to the amount of damages to be awarded; it would not have extended to the liability itself. Nor is the doctrine confined in other instances to the case where the person sought to be held is an insurer of the safety of the person injured. This court, in the case of *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 Pac. 325, applied the doctrine to a case where the person was injured while in a dry goods store by the fall of a basket from an overhead carrier system; citing authority to show that the holding was sustained by the great weight of authority. Surely it will not be contended that the proprietor of a merchandise store is an insurer of the safety of every person who enters it.

But these latter inquiries are not material to the question in hand. They are cited to show that a holding that denies to a servant, simply because he is a servant, the benefit of the rule of *res ipsa loquitur* in a proper case is unreasonable and unjust, and is required by no rule of public policy. We see no reason to change our former holding, and the judgment appealed from will be affirmed.

HADLEY, C. J., DUNBAR, RUDKIN, MOUNT, and CROW, JJ., concur.

[No. 7004. Decided November 14, 1908.]

A. J. WEST, *Respondent*, v. JOHN I. MARTIN *et al.*, *Appellants*.[1]

ADMIRALTY — JURISDICTION—MARITIME TORTS—COURTS—COLLISION. An injury by a vessel to the pier of a bridge over a navigable stream is not a maritime tort, of which the courts of admiralty would have jurisdiction, since the connection of the bridge with the land is the deciding feature rather than the matter of locality; and it is immaterial that the damage was largely effected by the action of the water after the bridge fell.

SHIPPING—LIENS—TORTS BY VESSEL—DAMAGE TO BRIDGE. Bal. Code, § 5953, providing for liens on a vessel for injuries committed by it to persons or property, gives a lien for damages by a vessel to the pier of a bridge.

SAME—COURTS—JURISDICTION—STATE LIENS ON VESSELS. The state courts have jurisdiction to enforce a lien given by state laws for damages done by vessels, where the admiralty courts are without jurisdiction.

SAME—LIENS—AGAINST VESSEL — ATTACHMENT — ENFORCEMENT—RECEIVERS—JURISDICTION—BOND FOR RELEASE—EFFECT. In an action to enforce a lien given by a state law upon a vessel for damages, the appointment of a receiver for the vessel is the equivalent of an attachment and the proceeding is *in rem;* and upon the defendants' giving a bond for the release of the vessel, the regularity of the attachment cannot be questioned.

SAME—DAMAGES—INJURY BY VESSEL. The measure of damages for injury by a vessel to a pier and portion of a bridge is the actual cost of repairing it, and a reasonable sum as the net profits of the bridge during the time it could not be used.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 26, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to enforce a lien against a vessel for damages. Reversed.

J. C. Cross, *W. H. Brinker*, and *Richard Saxe Jones* (*A. Emerson Cross*, of counsel), for appellants.

John C. Hogan, for respondent.

[1]Reported in 97 Pac. 1102.

ON REHEARING.

HADLEY, C. J.—A rehearing was granted in this cause, and argument was heard at the present term. A statement of the case may be found in the original opinion, 47 Wash. 417, 92 Pac. 334, to which we here refer in order to avoid repetition. The only question determined by the former opinion was that of jurisdiction. It was held that the facts brought the case within the jurisdiction of admiralty. In view of certain discriminations which had theretofore been made in the decisions of the supreme court of the United States, it was believed that that tribunal would so hold should it be called upon to consider facts identical with those involved herein concerning the locality of the collision and the resulting injury. It now appears, however, that we erred in the entertainment of that view. Since our decision was rendered the supreme court of the United States has rendered two decisions directly involving collisions between vessels and bridges which span navigable waters. *Cleveland Terminal & Valley R. Co. v. Cleveland Steamship Co.*, 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508; *The Troy*, 208 U. S. 321, 28 Sup. Ct. 416, 52 L. Ed. 512.

In the case first above cited, the court followed what was said in *The Plymouth*, 3 Wall. 20, 18 L. Ed. 125, distinguished what was said in *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236, and reached the conclusion that the locality of the collision was not maritime, for the reason that the injured structure was so connected with the shore that it immediately concerned commerce upon the land. The two cases cited were companion cases in their facts, although one was appealed from the northern district of Ohio and the other from the western district of Wisconsin. The decisions were rendered on the same day, and the decision in *The Troy* was based upon the opinion in the first case cited. So far as the question of locality is concerned, those decisions are binding upon this court.

In our former opinion we simply endeavored to anticipate what would be the decision of the higher tribunal in such a case, and now that we find we were mistaken, it becomes our duty to reverse our former holding upon this subject, unless a further feature suggested by appellants has the effect to establish the locality of this injury as a maritime one. We refer to the matter mentioned at the close of the former opinion where it was suggested that, inasmuch as the damage was largely effected by the action of the water after the bridge fell, the locality of the damage was, for that reason, a maritime one. We were of the view that when that opinion was prepared that the Federal supreme court was disposed to give much force to the matter of locality in determining the dividing lines between admiralty jurisdiction and that of the state courts, and that very technical distinctions had been observed in order to fix the locality as being either maritime or nonmaritime. The later decisions cited above seem, however, to give more force to the character of the structure colliding with the vessel, it being connected with the land or otherwise, as the determining factor, than to the mere matter of locality which was so much discussed in the earlier decisions. We therefore believe there are no facts in this case to distinguish it from the later decisions cited so far as the matter of locality is concerned, and that upon that question the admiralty court has not jurisdiction.

The appellants further contend that the state court has no jurisdiction, for the reason that the statute invoked by respondent and cited in the former opinion is not applicable to the facts of the case at bar, and if so, that the statute is unconstitutional. It having been determined that admiralty has not jurisdiction, then it must follow that the subject is open for state legislation, and is within the jurisdiction of the state courts. The statute, Bal. Code, § 5953, provides for liens upon "all steamers, vessels, and boats, their tackle, apparel and furniture." It is evidently intended to reach foreign as well as domestic vessels, and the property injured

by the vessel need not necessarily be transportable, as argued by appellants. The statute is broad enough to include damage to a permanent structure like a bridge. To give it any other construction would be extremely technical, and we do not think the legislature intended that a restricted or narrow meaning should be given the statute. The statute expressly provides that demands for injuries by the vessel shall constitute liens upon the vessel. Such liens created by state statutes are enforcible in the state courts when the subject-matter is not within the jurisdiction of admiralty.

"The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this, that wherever any lien is given by a state statute for a cause of action cognizable in admiralty either *in rem* or *in personam*, proceedings *in rem* to support such lien are within the exclusive jurisdiction of the admiralty courts. But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of this state." *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. Ed. 921.

The state court therefore has jurisdiction in the case at bar to enforce a lien for the damage done.

A temporary receiver was appointed by the court, and the vessel was taken in charge by him at the beginning of this action. As suggested by respondent, this was in effect an equitable attachment of the property. The appellants entered an appearance, and executed a bond for the release of the property, which bond was to the effect that appellants will pay to respondent any sum or claim which may be established in this case upon the cause of action mentioned in the complaint. The bond was like that given in the case of *Johnson v. Chicago & Pac. Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447. The court there said:

"So far, therefore, as this suit is concerned, the action, in the shape in which it comes before this court, is a suit *in*

personam with an attachment as security, the attachment being based on a lien given by the state statute, and a bond having been, by the act of the defendant, substituted for the thing attached."

The situation is analogous to that of an attachment at law where a bond for the release of the attached property has been given, conditioned for the payment of the judgment which shall be obtained in the cause. The security of the bond becomes substituted for that of the released property, and any question as to the regularity of the attachment cannot afterwards be raised. *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004. We hold that the statute is valid, and that the court had in all respects jurisdiction to enter the judgment.

It is urged by appellants that sufficient authority from the war department of the United States to maintain the bridge was not shown. We are satisfied with the showing upon that subject, and believe that no error was made by the trial court in so finding.

Appellants object to the rule for measuring damages adopted by the court. They contend for the difference between the market values of the bridge before and after the injury as the true measure. Such a rule under the circumstances would be fraught with much uncertainty. The property was peculiar and local in its nature, and the market value was necessarily regulated by the amount of demand for its use by the public at that particular place, having reference to the population of the city at that time and to the probable increase thereof within reasonable limitations. An attempt to establish such a value it must be seen would have been attended with much uncertainty. Again, the damage was to a portion of the bridge only, which compelled the making of repairs before any part of it could be used. It was not an article that respondent could procure in the market. In such case, we think the true measure is the actual cost of repairing. *Jackson etc. Works v. Hurl-*

burt, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. 432. It is also urged that recovery of a reasonable sum as the net profits from the bridge during the time it could not be used should have been denied. We think there was no error in this regard.

"Where the natural and direct result of a tort is the interruption of or an injury to an established business, there may be a recovery of profits lost during the period of enforced suspension or by reason of the tortious act." 8 Am. & Eng. Ency. Law (2d ed.), 625. See, also, Sutherland, Damages (3d ed.), § 70.

We believe that the findings of the court are substantially supported by the testimony, and that they should not be disturbed. The judgment is affirmed.

RUDKIN, MOUNT, CROW, and DUNBAR, JJ., concur.

FULLERTON, J., took no part.

[No. 7646. Decided November 14, 1908.]

CORA P. STEWART, *Appellant*, v. EMMA MARIA KLEINSCHMIDT, *Respondent*, THOMAS N. MORRIS *et al.*, *Defendants*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—WHAT LAW GOVERNS—DOMICILE. The status of property acquired by a husband and wife while residing in this state, is not governed by the laws of Ohio by reason of the fact that they made an agreement respecting the property while temporarily in Ohio on a visit, with a continuous intention of returning to their home in this state.

SAME—COMMUNITY DEBT. A judgment founded on a transaction relating to dealings in the stock of a corporation and to a contract for assisting in the management of its affairs in the interest of the community is a community debt.

SAME—SEPARATE DEED FROM HUSBAND—PROPERTY OF WIFE. Under Bal. Code, § 4539, upon a deed of community realty from a husband to the wife, the same becomes her separate property, and is not liable for a community debt subsequently contracted by the husband.

[1]Reported in 97 Pac. 1105.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 16, 1908, upon findings in favor of the defendants, dismissing an action to quiet title, after a trial on the merits. Modified.

John C. Stallcup, for appellant.

T. W. Hammond, *Geo. B. Cole*, and *John E. Humphries*, for respondent.

HADLEY, C. J.—This is an action to remove from certain real estate in Pierce county the cloud of a judgment and an execution sale thereunder. The plaintiff is the wife of the defendant J. Edie Stewart, and she alleges that she is now, and for seven years has been, the owner in fee of certain described realty in Tacoma, the ownership being in her own separate right, and the property being her separate property. She alleges that the defendant Kleinschmidt obtained a judgment against plaintiff's husband on January 17, 1907, the judgment having been rendered by the superior court of King county for more than $26,000, and that a transcript thereof was filed in the office of the county auditor of Pierce county; that an execution was issued in the latter county and delivered to defendant Morris, as sheriff of that county, who levied upon the plaintiff's real estate and sold it to satisfy the judgment, the defendant Kleinschmidt being the purchaser at the sale. The complaint charges that the judgment is void, and a decree is also sought declaring the property to be the separate property of the plaintiff, and that it is discharged from any lien or claim arising from the judgment. The defendant Stewart answered, disclaiming any interest in the land, and the defendant Kleinschmidt answered denying that the land is plaintiff's separate property and alleging that it is the community property of plaintiff and the defendant Stewart, and also that the debt upon which the judgment was based was the community debt of the same persons. The cause was tried by the court without a jury, and resulted in

a judgment dismissing the action, from which the plaintiff has appealed.

Appellant contends that the court erred in not regarding the statutes of Ohio, it being claimed that the appellant and her husband were citizens and residents of that state when they made certain agreements with reference to the land. We think the evidence does not so show. The two lived together in Tacoma when the lands were acquired, and were afterwards in Ohio during a mere temporary period, with the continuous intention of returning to their home in Tacoma. The actual domicile of the parties was therefore in the state of Washington all the time. Under appellant's own testimony, we think it cannot be said that she can avail herself of the laws of Ohio for the determination of her rights as wife in the realty in question, but those rights must be determined by the laws of this state.

It is next urged that it was error to hold that the real estate was community property and, as such, liable to satisfy the judgment against the husband. The transaction upon which the judgment was founded was undoubtedly in the interest of the community, since it related to dealings in the stock of a corporation and to a contract for assistance in the management of its affairs. There was, therefore, no error in holding that the debt was a community debt, and if the property was community property it became liable for the judgment. We think the finding that the land was community property is supported by the evidence except as to the following, to wit: Lots 15, 16, 17, and the north five feet of lot 18, in block 9, of Home Addition to Tacoma. The husband deeded his interest in the above property to the wife before the creation of the debt upon which the judgment is based. Under our statute, Bal. Code, § 4539 (P. C. § 3886), the lots then became the separate property of the wife, the appellant here, and they were not liable for the satisfaction of this judgment.

It is insisted that the contract which gave rise to the judgment was entered into by another for the appellant's husband, and that such other person was not authorized to make the contract. We think that full authority appears from the evidence, and that no good reason is shown why the judgment shall not be given full force.

We therefore think the judgment should be affirmed, except in so far as it relates to the lots described as being in the Home Addition. The cause is remanded with instructions to modify the judgment in that particular only, and to enter judgment in appellant's favor fully discharging those lots from liability under the former judgment and execution. The appellant is entitled to recover her costs on this appeal.

RUDKIN, MOUNT, CROW, and DUNBAR, JJ., concur.

FULLERTON and ROOT, JJ., took no part.

[No. 7483. Decided November 18, 1908.]

EDNA MURRILLA, *Respondent*, v. SAMUEL GUIS, *Appellant*.[1]

DISCOVERY — INTERROGATORIES — MATERIALITY — STRIKING OUT — WAIVER OF ERROR. Defendant's right to demand interrogatories tending to a discovery of the fact that plaintiff was under age and incapacitated from suing, which were struck out because her complaint alleged that she was only nineteen, is waived if not renewed after amendment of the complaint to show that she was twenty-three.

SEDUCTION—ACTION FOR DAMAGES—STATUTES—EXTRATERRITORIAL EFFECT—EVIDENCE—PRESUMPTION AS TO LAWS OF SISTER STATE. Bal. Code, § 4831, providing that an action for seduction may be maintained by an unmarried female authorizes a suit in this state for a seduction committed in another state or territory, in the absence of allegation as to the laws of the sister state, the presumption being that they are the same as the laws of this state.

SAME—INDUCEMENTS—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show a prima facie case of seduction, where, although the plaintiff's evidence showed a case of rape in the first instance,

[1]Reported in 98 Pac. 100.

she consented to the continuation of relations for several months, on the promise of the defendant to protect her and by reason of her frame of mind produced by the first ravishment.

SAME—PREVIOUS CHASTE CHARACTER OF PLAINTIFF—WEIGHT OF EVIDENCE—QUESTION FOR JURY. In an action for the seduction of an actress, employed in a dance hall and saloon to sell liquor and entertain customers, the previous chaste character of the plaintiff and the weight of her evidence, as against that of the defendant, who admitted that he was one of the proprietors of the place and that the same was a house of ill-fame, is for the jury.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 16, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for damages for seduction. Affirmed.

G. C. Israel, for appellant, contended, among other things, that the statute giving the right to an unmarried female over the age of twenty-one years to wage an action for damages for her seduction has no extraterritorial effect, and the court was therefore without jurisdiction. 25 Am. & Eng. Ency. Law (2d ed.), p. 190 *et seq; Buckles v. Ellers*, 72 Ind. 220, 37 Am. Rep. 156, and note. The statute being penal, when relied upon, must be pleaded and proven. *Selma etc. R. Co. v. Lacy*, 43 Ga. 461; *Hamilton v. Hannibal etc. R. Co.*, 39 Kan. 56, 18 Pac. 57; *Hyde v. St. Louis & Pac. R. Co.*, 61 Iowa 441, 16 N. W. 351, 47 Am. Rep. 820; *State v. Pittsburg etc. R. Co.*, 45 Md. 41; *Debevoise v. New York etc. R. Co.*, 98 N. Y. 377, 50 Am. Rep. 683; *Murphy v. Collins*, 121 Mass. 6. The trial court erred in refusing defendant's motion to dismiss the jury and grant defendant judgment, for the reason of the insufficiency of the evidence to justify any verdict upon the issues tendered in her complaint. *Stowers v. Singer*, 113 Ky. 584, 68 S. W. 637; *Marshall v. Taylor*, 98 Cal. 55, 32 Pac. 867, 35 Am. St. 144; *People v. Clark*, 33 Mich. 112; *Andre v. State*, 5 Iowa 389, 68 Am. Dec. 708; *Boak v. State*, 5 Iowa 430; *Wood v. State*, 48 Ga. 192, 15 Am. Rep. 664; *Breon v. Henkle*, 14 Ore. 494, 13

Pac. 289; 25 Am. & Eng. Ency. Law (2d ed.), p. 227; *State v. O'Hare*, 36 Wash. 516, 79 Pac. 39, 104 Am. St. 970, 68 L. R. A. 107; *State v. Cochran*, 10 Wash. 562, 39 Pac. 155; *People v. Nelson*, 153 N. Y. 90, 46 N. E. 1040, 60 Am. St. 592.

Parker & Brown, for respondent, contended, *inter alia*, that error, if any, in striking interrogatories propounded by plaintiff, was not prejudicial. *Du Clos v. Batcheller*, 17 Wash. 389, 49 Pac. 483. The courts of this state must take judicial notice of the laws of the District of Alaska. *Nelson v. Pyramid Harbor Packing Co.*, 4 Wash. 689, 30 Pac. 1096; 7 Ency. of Evidence, 947, 955, 957; *Arayo v. Currel*, 1 La. 528, 20 Am. Dec. 286; *Stokes v. Macken*, 62 Barb. 145; *United States v. Jackson*, 104 U. S. 41, 26 L. Ed. 651; *Eastwood v. Kennedy*, 44 Md. 563; *Flanigen v. Washington Ins. Co.*, 7 Pa. St. 306; *Bird v. Commonwealth*, 21 Gratt. (Va.) 800; *Appollos v. Staniforth*, 3 Tex. Civ. App. 502; *Barranger v. Baum*, 103 Ga. 465, 30 S. E. 524, 68 Am. St. 113; *Herschfeld v. Dexel & Co.*, 12 Ga. 582; *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736. There was sufficient evidence of the crime charged. 25 Am. & Eng. Ency. Law (2d ed.), 190; *Marshall v. Taylor*, 98 Cal. 55, 32 Pac. 867, 35 Am. St. 144. Under the decisions of this court the findings of the jury in such cases as this are conclusive. Pierce's Code, § 5934; *Hanstad v. Canadian Pac. R. Co.*, 44 Wash. 505, 87 Pac. 832; *McGowan v. Northeastern Siberian Co.*, 41 Wash. 675, 84 Pac. 614; *Druglis v. Northwestern Imp. Co.*, 41 Wash. 398, 83 Pac. 101; *In re East Spring St.*, 41 Wash. 366, 83 Pac. 242; *Weir v. Seattle Elec. Co.*, 41 Wash. 657, 84 Pac. 597.

HADLEY, C. J.—This is an action to recover damages for seduction. The plaintiff alleges that her injury was accomplished by the defendant at Douglas Island, Alaska; that the defendant was the proprietor of a theater and dance hall at

said place; and that for a period of about five months immediately following March 1, 1906, the plaintiff was employed by him as an actress to assist in the public entertainment at the theater by singing and dancing upon the stage. She alleges that the defendant was then a man of maturity, of the age of thirty-nine years, of great ability and extensive experience in worldly affairs; that he exercised undue influence over her, and by taking advantage of her youth and inexperience, he wrongfully seduced her and sustained intimate relations with her for a period of three months, resulting in her pregnancy.

The defendant answered, denying that he is guilty of the charge, and alleged that he was one of the proprietors of the saloon and dance hall on Douglas Island, wherein women were employed to publicly dance with the patrons and to assist in the sale of liquors to the latter from the bar of the saloon, for which the women were allowed a percentage upon sales made; that there was also maintained in connection therewith a stage upon which the women so employed were required nightly at intervals to sing, dance, and engage in short vaudeville performances; that the women had sleeping apartments in the second story of the building, and were allowed to receive male visitors in their rooms, where they were served with wines and liquors at all hours of the day and night. He alleges that the female inmates of said dance hall, including plaintiff, were reputed to be women of ill-fame, and that they were regularly fined as such. The cause was tried before a jury, and a verdict was returned for the plaintiff in the sum of $2,500. From a judgment for that sum, the defendant has appealed.

The first matter urged as error is that the court struck a part of the appellant's interrogatories, propounded to the respondent before the trial. There were one hundred and thirty-four interrogatories in all, and twenty-eight were stricken. Those stricken related to respondent's parentage, her baptism, the name of her husband, if she had one, her first employment, and other similar matters, all of which the

court deemed to be immaterial. She answered other interrogatories not stricken, giving the date of her birth and her age, and stating that she had never been married or divorced. It is argued that, if respondent can maintain this action at all, she must have been at least twenty-one years of age when it was commenced, and that the interrogatories stricken would have aided in making discoveries as to respondent's true age.

We think the interrogatories allowed to remain were sufficiently comprehensive, and that appellant was not prejudiced by the exclusion of those stricken, in view of the averment of the complaint as it stood, when the interrogatories were stricken, that respondent was but nineteen years of age. In the original complaint respondent's age was alleged as nineteen years, but upon the trial leave to amend by alleging that she was twenty-three was asked. At the time the interrogatories were stricken, the age standing alleged as nineteen, they became immaterial for the purposes now urged, for the reason that the complaint itself placed the age under twenty-one, thereby making proof upon that subject unnecessary. After the amendment there was no renewal of the motion to submit these rejected interrogatories, or for a continuance of the trial. It is claimed that the record does not show that leave to make such amendment was granted. It does show the express request of counsel for leave to amend, and in the instructions to the jury the court, in stating the issues, said that respondent alleged that she was a virtuous maiden of good character and standing among her associates, of the age of twenty-one years. So that it appears that the amendment was regarded by the court and counsel as made. The need for these particular interrogatories to serve the necessities of ante-trial discovery on the subject of age was not urged after they became pertinent under the averment that respondent was twenty-one, and any right to demand them was therefore waived.

The next point urged is that the court erred in refusing appellant's motion to dismiss the jury and grant judgment

for appellant when respondent rested her case in chief, for the reason that the proof showed that the court had no jurisdiction of the subject-matter. This contention is based upon the showing that the facts which it is claimed constitute the seduction all occurred in Alaska, while both parties resided there. In this state we have a statute authorizing the maintenance of such an action, which is in terms as follows:

"An unmarried female over twenty-one years of age may maintain an action as plaintiff for her own seduction, and recover therein such damages as may be assessed in her favor; but the prosecution of an action to judgment by the father, mother, or guardian, as prescribed in the preceding section, shall be a bar to an action by such unmarried female." Bal. Code, § 4831 (P. C. § 259).

The suggestion is made that the above statute has no extra-territorial effect and gives no right of action, merely because the appellant is now domiciled in this state, inasmuch as the offense was committed within another jurisdiction. It is maintained by appellant that, if such an action can be entertained by the courts of this state, it must be by authority of a statute where the offense was committed. The respondent did not plead a similar statute or any statute permitting such an action in Alaska, but she invokes the rule that, in the absence of proof to the contrary, the court will presume that the law of Alaska is the same as that of this state. In *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736, this court held that the above rule of presumption applies to statutory as well as to common law. That decision is directly in point, and is controlling here. The motion was, therefore, properly denied.

It is next assigned that the court erred in refusing appellant's motion to dismiss the jury and grant judgment for appellant, made when respondent rested her case in chief, on the ground that the evidence failed to establish even a *prima facie* case of seduction, and tended to prove rape, if anything. Undoubtedly the testimony of respondent tended to show a

case of rape in the first instance. She testified that appellant called at her room and brought wine with him, insisting that she should drink with him, which she did; that soon after drinking she lost consciousness and, upon recovering consciousness, she was lying upon her bed and appellant was sitting beside her; whereupon she discovered that she had been ravished. The above, it is true, tended to establish rape only; but she proceeded to testify that, a day or two following the occasion specified, appellant again called and insisted that she should yield to him, which she consented to do because of his promise to protect her and also because of the feeling that she was already ruined and she did not care what became of her. She says that their relations were afterwards repeatedly continued under those circumstances for several months, during which time a condition of pregnancy arose which was afterwards avoided by abortive means provided by appellant. We think the above showed a *prima facie* case of seduction. The artifices used by appellant, taken all together, had the effect to overcome her scruples at a time when she was capable of consenting, and did consent, and not the least of those artifices was the method used the first time which left her in a frame of mind to be afterwards easily influenced to yield to his demands. The motion was properly denied.

It is next insisted that the motion for new trial should have been granted for the reason that the evidence was insufficient to justify the verdict. It is undoubtedly true that the circumstances were such as to challenge the attention of the jury to a careful scrutiny of the respondent's testimony. She was admittedly an actress and singer in a dance hall, surrounded by women some of whom were undoubtedly lewd. But she had followed the vocation of a vaudeville actress and singer from her young girlhood, and insists that she had always maintained her chastity amid her necessary surroundings, following her vocation only for the purpose of obtaining a livelihood. The testimony of a number of other witnesses also tended to establish that fact. It is true that ap-

pellant denied that he had sustained any criminal relations with respondent, but both parties were before the jury and were observed by the jurors. The appellant admitted and even alleged in his pleadings that he was, at the time of the alleged seduction, one of the proprietors of the house on Douglas Island, which was not only maintained as a saloon and dance hall, but for purposes of prostitution as well. Considering his own character, he could not well appeal to the jury to give greater weight to his testimony than to that of respondent. The jury evidently believed the testimony of respondent as against that of appellant, and as it was the province of the jurors to pass upon the weight of the evidence, we think the trial court did not err in refusing to set aside the verdict.

The judgment is affirmed.

RUDKIN, CROW, and DUNBAR, JJ., concur.

FULLERTON, J., took no part.

MOUNT, J. (dissenting)—I dissent. The plaintiff's evidence shows that she was not of previous chaste character and that she was not seduced. The motion for a directed verdict should have been granted.

[No. 7641. Decided November 18, 1908.]

WALTER J. SMITH, *Respondent*, v. THE CITY OF TACOMA, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—PLEADING—DESCRIPTION OF DEFECT—VARIANCE—PROOF OF INCIDENTAL MATTER. In an action for injuries sustained in a fall upon a sidewalk, alleged to have been occasioned by the maintenance on an incline of a smooth iron cover for a coal hole, without any protecting slugs, whereon the plaintiff slipped and fell, evidence that a projecting handle of the door caught plaintiff's foot as he slipped and fell is not a variance, and is admissible as an explanatory detail without previous allegation as to the door knob.

SAME—COVER OVER COAL HOLE—NEGLIGENCE—NOTICE—QUESTIONS FOR JURY. In an action for injuries sustained by a fall upon a slippery iron cover of a coal hole, maintained on an inclined sidewalk, evidence that the cover was worn smooth and slippery and had been in use several years is sufficient to make a question for the jury as to the negligence of the city and constructive notice of the defect, although rain at the time appears to have been an element.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered May 19, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained in a fall upon a sidewalk. Affirmed.

T. L. Stiles, F. R. Baker, and *F. A. Latcham*, for appellant, contended that the rain being an intervening cause in producing the injury, the city was not liable. 3 Abbott, Mun. Corp. § 1021; 5 Thompson, Negligence, par. 6156; *Cromarty v. Boston*, 127 Mass. 329; *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128; *Leonard v. Butte*, 25 Mont. 410, 65 Pac. 425. Constructive notice is presumed only when the defect has existed for such a length of time and under such circumstances that the city or its officers, in the exercise of proper care and diligence, ought to have obtained knowledge of it. Elliott, Roads and Streets (2d ed.), § 626;

[1]Reported in 98 Pac. 91.

McGrail v. Kalamazoo, 94 Mich. 52, 53 N. W. 955. Our new towns, built on hillsides, have a difficult task set them in the matter of providing fairly decent thoroughfares, and the rule of liability should not be enforced against them with any greater degree of strictness than it is in older communities. *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752; *Morris v. Philadelphia*, 195 Pa. St. 372, 45 Atl. 1068.

Govnor Teats, for respondent.

HADLEY, C. J.—This is an action to recover for personal injuries received by slipping and falling upon a sidewalk. The place of the accident was upon South Thirteenth street, in the city of Tacoma, where the grade of the street is at an incline down the hill from Commerce street to Pacific avenue. In the construction of the sidewalk, a coal hole was placed there for the use of the abutting owners, which was covered with a smooth piece of sheet steel or iron, lying at the same incline as the surface of the walk. The complaint charges that the place was dangerous for people to pass over because of its smoothness and its slippery condition; that the city had for a long time negligently permitted the dangerous condition to exist; and that by reason thereof the plaintiff slipped upon the covering and fell in such a manner that both bones of his left leg were broken and his left ankle was sprained. The cause was tried before a jury, and a verdict was returned for the plaintiff in the sum of $1,250. From a judgment against it for that sum, the city has appealed.

The city's first contention is that the court erred in permitting the respondent and his witnesses to testify as to the projecting handle of the door. Both in his claim presented to the city council, and in his complaint, respondent specified as the cause of his injury the door in the sidewalk, without any projecting slugs, but with a smooth surface on an incline and permitted to become smooth and slippery

from wear. The evidence showed that respondent slipped upon this smooth surface and that, as he was in the act of falling, his foot caught on the projecting handle of the door. The contention is that, as nothing had been said about the projecting handle, either in the notice to the city or in the complaint, it was improper to permit evidence with reference to it. We think the reference which was made to it was merely incidental in the description of how the accident happened. The maintenance of the smooth surface at such a place was the negligence charged, and the injury was undoubtedly traceable to the slipping in the first instance, the catching of the foot in the handle being merely an incidental happening. We think it was not prejudicial error to permit reference to this incident of the falling, within the rule mentioned in *Benson v. Spokane*, 39 Wash. 101, 80 Pac. 1106, since it was a mere unimportant, explanatory detail, the slippery condition of the walk being the primary cause of the accident.

It is next urged that it was error to deny appellant's motion for a nonsuit. We think the evidence as to the very smooth and slippery character of the iron, as to the length of time it had been maintained—several years—and to the number of persons who had slipped and fallen there, was amply sufficient to go to the jury upon the question of negligence and constructive notice. Appellant contends that respondent did not stop with merely showing the smooth condition of the steel or iron, but that he added rain as an element present, and emphasized that feature. The appellant asks the question: "Would he have slipped without the rain?" and argues that a city is not liable to one who slips by reason of ice or snow, except in special cases, and that the same rule must apply when rain intervenes. 3 Abbott, Munic. Corpor., § 1021, is cited by appellant; but even there we find the statement that, while the mere presence of ice or snow may not be actionable, yet if other elements of actionable negligence also exist, liability may arise. There was another element of actionable

negligence in the case at bar, and that was the smooth and slippery iron or steel covering, even without the presence of rain. In *Roe v. Mayor etc.*, 4 N. Y. Supp. 447, the court said:

"In the present case, it was for the jury to say whether the slipperiness resulted from the wet and mud only, or from the smoothness of the covering, with the wet and mud upon it."

The same was true in the case at bar. A test for determining whether such a walk as the one involved here is sufficient as a matter of law is well outlined in *Cromarty v. Boston*, 127 Mass. 329, 34 Am. Rep. 38, as follows:

"If a walk is constructed of a material so smooth and hard that travelers shod in the ordinary way are defeated or obstructed in their attempts to pass over it by inability to get the hold upon it with their feet which is necessary to their walking forward, or the want of which causes them to lose their balance and fall, such walk cannot be said, as matter of law, to be safe and convenient. And if, in a sidewalk, the chief part of which is in proper condition for travel, a small part of the surface is constructed of material different from the remainder, and so smooth and slippery that a foot traveler, stepping suddenly upon it from the portion otherwise constructed, necessarily or probably slips and is likely to fall, it cannot be said, as matter of law, that such walk is not defective."

Within the above test, it was for the jury to say whether this sidewalk was defective or not. See, also, *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128. We think it was not error to deny the motion for nonsuit, and the motion for new trial on the ground of insufficiency of the evidence was also properly denied.

The judgment is affirmed.

RUDKIN, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7668. Decided November 18, 1908.]

BALSTON C. KENWAY, *Respondent*, v. DAVID M. HOFFMAN *et al.*, *Appellants*.[1]

APPEAL—REVIEW—ERROR FAVORABLE TO APPELLANT—NEW TRIAL—VERDICT—REMISSION OF EXCESS. Where, in an action on *quantum meruit* for services performed, no exception was taken to an instruction that the plaintiff was entitled to recover the whole sum demanded, if anything at all, the defendant cannot allege error in that the court inconsistently required the plaintiff to remit a part of the verdict, as that was favorable to the defendant.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—LACK OF DILIGENCE. A new trial asked on the ground of newly discovered evidence is properly denied for want of diligence, where the action was for drawing architect's plans, and the new evidence was that of expert witnesses at the trial who had since made an examination of the plans and claimed that they were defective.

SAME—CONTROVERTED AFFIDAVITS—DISCRETION. Where affidavits in support of a motion for a new trial for newly discovered evidence are controverted by affidavits by the adverse party, it is discretionary to grant or refuse a new trial.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered April 29, 1908, upon the verdict of a jury rendered in favor of the plaintiff for services performed. Affirmed.

Theo. D. Powell, for appellants.

Harry H. Johnston, for respondent.

HADLEY, C. J.—This action was brought to recover for services as an architect, in preparing the preliminary studies and sketches, and plans and specifications of a combination store and office building, five stories in height, to cost $45,000 for its construction. The plaintiff alleges, that he was employed by the defendants to prepare, and that he did prepare, such studies and sketches, and presented them to the defendants, who accepted them and then instructed him to proceed

[1]Reported in 98 Pac. 98.

and prepare the general drawings and specifications; that the plaintiff thereupon prepared the same in accordance with the preliminary sketches and studies, but that the defendants refused to accept and pay for them. The fair and reasonable value of the services is placed in the complaint at $1,575, and judgment is demanded for that sum. The defendants in their answer deny everything of a material nature which is alleged in the complaint. The cause was tried before a jury, and a verdict was returned for the plaintiff in the sum of $1,575. The defendants moved for a new trial, and the court required the plaintiff to submit to a new trial or remit $475 from the amount of the verdict. He chose the latter alternative, and filed a written stipulation that the amount should be reduced to $1,100. The new trial was thereupon denied, and the defendants have appealed.

The error assigned is that the court should have granted unconditionally appellants' motion for a new trial. There was conflict in the evidence to be sure, but there was sufficient evidence of an employment to sustain a verdict. The complaint did not allege any specific sum as the amount appellants agreed to pay, but it alleged the reasonable value of the services to be $1,575. Appellants wholly denied the employment and, also, the value of the services. The court instructed that, if respondent is entitled to recover at all, he is entitled to recover the full amount for which he sued. The complaint was apparently drawn upon a *quantum meruit* basis, and while for that reason the instruction may have been objectionable, yet no exception was taken thereto. Appellants now urge that the order of the court requiring a remittance from the amount of the verdict is inconsistent with the instruction which directed a verdict for the amount which was returned or for no sum at all. Appellants, however, accepted that instruction without objection as the law of the case. In its terms it permitted the return of a verdict for $1,575, and appellants are not now in a position to urge that it was erroneous. The remittance of any of the amount re-

turned by the jury was in appellant's favor, and although it may have been inconsistent with the theory of the instruction, yet appellants cannot urge that which is manifestly in their favor as a ground for reversal.

Appellants' argument that the evidence does not support the verdict is based largely upon the contents of affidavits filed in support of the motion for a new trial. These relate to alleged defects in the plans pointed out by experts whereby it is claimed the plans were incomplete. This matter was entirely open for investigation at the trial, and should have been taken up at that time. The persons making the affidavits were witnesses at the trial, and the plans and specifications were present and subject to the examination of all connected with the case. The suggestions in the affidavits do not, therefore, constitute newly discovered evidence which could not with reasonable diligence have been discovered and produced at the trial. Moreover, the affidavits submitted by appellants were denied by others submitted by respondent, making a conflict even at the hearing upon the motion for new trial. Under such circumstances, it was a discretionary matter with the trial court whether to grant or refuse a new trial.

We find no abuse of discretion, and the judgment is affirmed.

RUDKIN, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7223. Decided November 18, 1908.]

FAIRHAVEN PUBLISHING COMPANY, *Appellant*, v. THE CITY OF BELLINGHAM *et al.*, *Respondents*.[1]

NEWSPAPERS—LEGAL PUBLICATIONS—DAILY PAPERS. A newspaper printed every day except Sunday and Monday is a daily newspaper, within the meaning of an ordinance requiring the publication of official notices in a daily paper.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered December 11, 1907, dismissing an action to enjoin the letting of a contract for municipal printing, upon sustaining a demurrer to the complaint. Affirmed.

Rose & Craven, for appellant, cited: Webster, International Dictionary, p. 365; Black, Law Dictionary, p. 315; Anderson, Dictionary of Law, p. 709; Century Dictionary and Cyclopedia, p. 1443; The Living Age, November 2, 1907, p. 259; *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802; *Richardson v. Tobin*, 45 Cal. 30; *Tribune Pub. Co. v. Duluth*, 45 Minn. 27, 47 N. W. 309.

Thomas L. McFadden and *Hardin & Hurlbut*, for respondents, cited: 2 Abbott, Mun. Corp. p. 1329; *Lynn v. Allen*, 145 Ind. 584, 44 N. E. 646, 57 Am. St. 223, 33 L. R. A. 779; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 898; *Brown's Estate v. West Seattle*, 43 Wash. 26, 85 Pac. 854; *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022; *Richardson v. Tobin*, 45 Cal. 30; *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802.

PER CURIAM.—The city charter of the city of Bellingham provides that the city council shall annually let all the legal advertising to the lowest and best responsible bidder, who

[1]Reported in 98 Pac. 97.

shall give bonds to the city in such sum as may be fixed and approved by the city council, conditioned that he will publish all such legal advertising in a paper named in the bid, which paper it may be conceded for the purpose of this case is required to be a daily paper printed and published in the city of Bellingham. Pursuant to this provision of the charter, the city advertised for bids for doing the legal advertising of the city for the year 1908. Two bids were received in response to the notice, the one from the appellant, who is proprietor and publisher of the Bellingham Herald, a newspaper printed and published in the city of Bellingham six days in each week; the other from the American Printing Company, which is publisher and proprietor of The Morning Reveille, a newspaper printed and published in the city of Bellingham five days in each week, that is, every day except Sunday and Monday. The city council found the bid of the latter company the lowest and best, and proceeded to let the contract for the printing to that company. The appellant thereupon brought this action to restrain the council from so doing. Judgment went against them in the lower court, and this appeal is prosecuted therefrom.

The only question we are required to notice is whether The Morning Reveille is a daily paper, within the meaning of that term as it is used in the city charter. We think it is. The term daily, as applied to the publication of newspapers, is relative. It has never been given the exclusive meaning of every day of the week, month or year, but papers published every day except Sunday, or every day except Monday, or every day except both Sunday and Monday, are regarded by the general public as daily papers. This court in *Puget Sound Publishing Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802, held that a paper published every day except Sunday and legal holidays was a daily paper, and cited approvingly a case from California which held that a paper published every day except Monday was such a paper. A paper omitting both days may be less a daily publication than either

of these cited instances, but it is not so widely different from them as to require it to be put into a distinct class. It is a daily paper in the popular sense, and it was in this sense that the term was used in the city charter.

The judgment appealed from is affirmed.

[No. 7379. Decided November 18, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. B. C. POLLMAN, *Appellant*.[1]

PHYSICIANS AND SURGEONS—LICENSE—OFFENSES—WHAT CONSTITUTES PRACTICING—ADVERTISING AS "DR."—STATUTES—CONSTRUCTION. It is competent for the legislature to prohibit advertisement or the use of the words "Physician" and "Doctor" without first securing a license as a physician, and to provide that such use shall constitute "practicing medicine"; and it is immaterial that the words were used in connection with "Osteopathic and Magnetic" or "Drugless", or that the abbreviation "Dr." was employed in place of "Doctor."

STATUTES—TITLE AND SUBJECTS—SUFFICIENCY. The title to an act to regulate the practice of medicine and surgery is sufficiently broad to include provisions making it unlawful for an unlicensed person to call or advertise himself as "Physician" or "Doctor."

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered December 30, 1907, upon a trial and conviction of the offense of practicing medicine without a license. Affirmed.

Fairchild & Bruce, for appellant, contended that the title of the act is not sufficiently broad to include the offense charged. Cooley, Constitutional Limitations (5th ed.), 434; *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 46 Am. St. 315, 29 L. R. A. 79. It is not a proper subject of police regulation. In *re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Richie v. People*, *supra*; *Peo-*

[1]Reported in 98 Pac. 88.

ple v. Gilson, 109 N. Y. 389, 17 N. E. 343; *State v. Brown*, 37 Wash. 97, 79 Pac. 635, 107 Am. St. 798, 68 L. R. A. 889; *State v. Biggs*, 133 N. C. 729, 46 S. E. 401, 98 Am. St. 731, 64 L. R. A. 139. Advertising as a physician is not within the statutory prohibition, nor calculated to deceive the public. *Nelson v. State Board of Health*, 108 Ky. 769, 57 S. W. 501, 50 L. R. A. 383; *State v. Liffring*, 61 Ohio St. 39, 55 N. E. 168, 76 Am. St. 358, 46 L. R. A. 334; *State v. McKnight*, 131 N. C. 717, 42 S. E. 580, 59 L. R. A. 187; *Hayden v. State*, 81 Miss. 291, 33 South. 653, 95 Am. St. 471; *State v. Mylod*, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428.

Virgil Peringer, *George Livesey*, and *Newman & Howard*, for respondent, contended that the phrases "practice of medicine" and "practice of surgery" are broad enough to include the offense charged. Webster's Dictionary; 20 Am. & Eng. Ency. Law (2d ed.), 573; 22 Id. 780, 785; *Hewitt v. Charier*, 16 Pick. 353; *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; *Bragg v. State*, 134 Ala. 165, 32 South. 767, 58 L. R. A. 925; *People v. Allcutt*, 102 N. Y. Supp. 678. The state may rely on alleging and proving the one alternative, that of advertising. *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *Hale v. State*, 58 Ohio St. 676, 51 N. E. 154. The practice of medicine or surgery without a license constitutes a misdemeanor. Laws 1901, p. 50; Bal. Code, § 3091; P. C. § 6289. The defendant's acts constituted practicing medicine and surgery. *Bragg v. State* and *People v. Allcutt*, *supra*; *State v. Heath*, 125 Iowa 585, 101 N. W. 429; *People v. Gordon*, 194 Ill. 560, 62 N. E. 858, 88 Am. St. 165; *O'Neil v. State*, 115 Tenn. 427, 90 S. W. 627, 3 L. R. A. (N. S.) 762; *State v. Wilhite*, 132 Iowa 226, 109 N. W. 730; *State v. Yegge*, 19 S. D. 234, 103 N. W. 17, 69 L. R. A. 504; *State v. Buswell*, 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68; *Parks v. State*, *supra*; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888; *State v. Edmunds*, 127 Iowa

333, 101 N. W. 431; *Territory v. Newman* (N. M.), 79 Pac. 706.

FULLERTON, J.—The appellant, Pollman, was informed against for the crime of practicing medicine without a license, the information, omitting its title and verification, being as follows:

"In the name and by the authority of the state of Washington I, Vergil Peringer, prosecuting attorney of Whatcom county, state of Washington, come now here and give the court to understand and be informed and on oath do accuse B. C. Pollman of the crime of practicing medicine without a license, committed as follows:

"Then and there being the said defendant, B. C. Pollman, in the city of Bellingham, county of Whatcom, state of Washington, and on or about the 11th day of August, 1907, did unlawfully practice medicine in the state of Washington in form and manner as follows to wit:

"That then and there being the said B. C. Pollman did not possess, and had not obtained, a license, to practice medicine or surgery, or any of the branches of medicine or surgery, within the state of Washington, and had not filed such license, or any copy thereof, with the clerk of said Whatcom county; that without first having obtained such license the said B. C. Pollman did then and there have and maintain an office and place of business at rooms 21 and 22 in the Commercial building, in the city of Bellingham, Whatcom county, Washington, with his name and the abbreviation "Dr." and the word "Physician" in public view, and did then and there on a sign extending over the street from or near one of the windows of his office, then and there maintained by him, advertise the following, "Dr. B. C. Pollman, Magnetic and Osteopathic Institute," and did then and there on the door which opens off Holly street and leads upstairs into said Commercial building and to the said offices of said B. C. Pollman, advertise the following, "Dr. B. C. Pollman, Osteopathic and Magnetic Physician, office hours 9 to 12 a. m., 1 to 6, 7 to 8 p. m.;" and on the door of said room 22, said room being a part of said B. C. Pollman's office, did advertise the following: "Dr. B. C. Pollman, private office," and on the door of said room 21, same being a part of his office,

the said B. C. Pollman did advertise as follows: "Dr. B. C. Pollman, Reception Room, Walk In," and did on a tin sign over the door of room 21 advertise as follows: "Dr. B. C. Pollman," and did on the door leading to his private office advertise as follows: "Dr. B. C. Pollman, Osteopathic and Magnetic Physician."

"That the said B. C. Pollman did then and there claim to be able to cure many and various diseases and ailments, including spinal meningitis, lung and heart disease, ossified hand and wrist joints, female weakness, consumption, paralysis, blood poisoning, chronic constipation, typhoid pneumonia, chronic complicated diseases, nervous complications, organic diseases, apoplexy, rupture, diseases of the stomach and liver, and inflammation of the bladder, and did then and there assume and advertise the title of 'Dr.' and 'Physician' in such a manner as to tend to show that he, the said B. C. Pollman, was and is a lawful practitioner of some of the branches of medicine and surgery, in such a manner as to convey the impression that he, the said B. C. Pollman, was and is a practitioner of medicine and surgery under the laws of the state of Washington, and did cause to be published in the Bellingham Herald, a daily newspaper of general circulation in the city of Bellingham and in the county of Whatcom, and in the state of Washington, an advertisement in words, figures and expressions as follows, to wit:

DR. POLLMAN'S UNDENIABLE SUCCESS.

INVESTIGATE AND BE CONVINCED.

One thousand dollars offered to anyone who can prove of any fake testimonials published.

Here is a money-making proposition to anyone who is in doubt or skeptical of the ability and skill of Dr. Pollman, a drugless physician, at the Commercial house, East Holly street.

One thousand dollars is offered to anyone who is capable of verifying that the writer is publishing fake testimonials.

The public may cast away hate, prejudice, fear, worry and useless excitable talk over a perfect Drugless Science, which is one of the greatest discoveries to cure chronic and acute sufferers and is saving many precious lives which would otherwise have been lost by the old school of drugs.

MANKIND IS ALWAYS DOUBTING.

Some years ago many doubted the power of steam to run a ship, locomotive, and so on; also the great unknown power of

electricity, which has puzzled many scientists and who are convinced today of an unlimited power in the future, which already now moves and operates trains, boats, telegraph, telephone and wireless telegraphy, etc., and all this new and scientific demonstrations and facts we have experienced in the last 60 years. Humanity has slumbered many years in ignorance, and were kept in such condition by some rulers and their professed religious creed until God strengthened the mind of humanity, liberated man from slavery and endowed him with sufficient power to exercise his own five physical senses by which he has gained the great power of thought, force and freedom of progression. The people are thinking for themselves now, and they all know that we are living in a progressive century.

The writer wishes to predict that the future will bring to you Drugless Doctoring and that in about fifteen years from now very little medicines will be used to cure diseases.

The people should wake up by this time and know that drugs is the power of deception by which so many are made to believe for many years that it should cure them, but finally consult a Drugless Physician, who effects a cure.

For spinal meningitis I would advise you to call on this Physician, who has cured nine (9) cases and not lost one patient.

Following names are from grateful patients cured of different diseases, and testifying in writing for the welfare of humanity:

SWORN AFFIDAVITS ON FILE OF FOLLOWING NAMES PUBLISHED.

No. 1.—C. F. Wright, suffered for 8 years of complicated diseases. Cured.

No. 2.—Joseph Moore, suffered with lung and heart disease.

No. 3.—Mrs. J. J. Fox, cured of ossified hand and wrist joints.

No. 4.—Miss Emma Fritch, saved from a surgical operation for female weakness.

No. 5.—Rudolph Schott, cured of a hopeless case of consumption.

No. 6.—Mrs. Florence Stevens, cured of a hopeless case of paralysis.

No. 7.—M. A. Hillebrecht, cured of blood poisoning after surgical operations were performed.

No. 8.—Robert Oberlatz, cured of chronic constipation and heart disease of long standing.

No. 9.—J. E. Pearson's son cured of a hopeless case of typhoid pneumonia.

No. 10.—Mrs. F. L. Myers, cured of a chronic complicated disease.

No. 11.—J. A. Greyell, cured of nervous complications.

No. 12.—J. B. Johnson, pronounced incurable of consumption and other organic diseases, now cured.

No. 13.—John Davis, cured of apoplexy.

No. 14.—Mrs. and Mr. A. E. Morris' son, cured of rupture.

No. 15.—Aug. B. Miller, cured of injury from cut of axe after physicians failed to benefit.

No. 16.—J. C. Goodman, cured of stomach, liver and constipation troubles after six months' suffering.

No. 17.—Mr. and Mrs. R. Schurz's child, cured of a hopeless case of general complicated diseases.

No. 18.—Mrs. Catherine Crosby, cured of inflammation of bladder and constipation.

Dr. B. C. Pollman,
Commercial Hotel.

"That at said time and place the said B. C. Pollman was visited by sundry and divers persons, whose names are to the prosecuting attorney unknown, and said persons were then and there treated by said B. C. Pollman for the various maladies and diseases above mentioned. That the said B. C. Pollman did first make a diagnosis of each case for the purpose of determining the particular malady or disease from which said persons were suffering, and did thereafter treat said persons for said diseases above mentioned by kneading, rubbing, pressing, and otherwise manually manipulating the body, limbs, muscles, and nerves, and by flexing and manually manipulating the joints, and so the prosecuting attorney, as aforesaid, doth accuse the said B. C. Pollman of the crime of practicing medicine without a license, all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington.

"Dated at Bellingham, in the county of Whatcom, state of Washington, on this 22nd day of November, 1907."

After arraignment the appellant demurred to the information on the ground that it did not state facts sufficient to constitute a crime. The demurrer was overruled, whereupon the appellant elected to stand and abide by his demurrer, and prayed the judgment of the court at that time. The court thereupon adjudged him guilty of practicing medicine without a license, and sentenced him to pay a fine. This appeal is from the judgment so pronounced.

The statute regulating the practice of medicine in this state provides, among other things, that before any person

shall be entitled to practice medicine he shall procure from the board of examiners created by a statute a license so to do, which license shall be filed in the office of the county where the practitioner resides. Section 8 of the act, as amended in 1901 (see p. 50), reads as follows:

"Section 8. Any person practicing medicine or surgery or either of its or their branches within this state without first having obtained, and filed the license provided for in this act, or contrary to the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars nor more than one hundred dollars or by imprisonment in the county jail not less than ten days nor more than ninety days, or by both such fine and imprisonment. In all prosecutions under the provisions of this act, evidence that the defendant has failed to file a license with the county clerk as herein required, shall be *prima facie* evidence that the defendant is not a legally licensed practitioner. And each day of such illegal practice shall be deemed a separate offense under this act. All fines collected under the provisions of this act shall be paid into the state treasury for the use and benefit of the common schools of this state. Any person shall be deemed as practicing within the meaning of this act who shall have and maintain an office or place of business with his or her name and the words physician or surgeon 'Doctor,' 'M. D.' or 'M. B.' in public view, or shall assume or advertise the title of doctor or any title which shall show or shall tend to show that the person assuming or advertising the same is a lawful practitioner of any of the branches of medicine or surgery in such a manner as to convey the impression that he or she is a practitioner of medicine or surgery under the laws of this state; or any person who shall practice medicine or surgery under a false or assumed name, or under cover of the name of some legal practitioner, or personate any legal practitioner or for a fee prescribe or direct, or recommend for the use of any person any drug or medicine for the treatment, care or relief of any wound, fracture or bodily injury, infirmity or disease: *Provided, however*, That this act shall not apply to dentists while confining themselves strictly to dentistry. Justices of the peace and the superior court shall have concurrent jurisdiction of violations of this act and it shall be the duty of the respective county or district attorneys

to prosecute all violations of this act. In cases of appeal to the superior court as hereinbefore provided, it shall be the duty of the prosecuting attorney of the county wherein such appeal shall be tried to represent said board upon said appeal. And in all cases of appeal to the supreme court under the provisions of this act the attorney general shall represent said board upon such appeal."

The appellant contends that a statute prohibiting the "practice of medicine and surgery, or either of its or their branches, within this state without first having obtained and filed" a license, without further definition of the act prohibited would be nugatory for want of certainty, it being impossible to know what acts the legislature intended to include in the phrase, "the practice of medicine and surgery"; and hence that the only thing in the statute cited that can be construed as being prohibited is the maintaining of an office or place of business and advertising as a physician or surgeon as therein described, and that this latter prohibition is not only not within the title of the act, but is in excess of the powers of the legislature, because not a proper subject of police regulation.

Whether the words "practicing medicine or surgery" are sufficiently definitive of the acts intended to be prohibited to enable a court to say that any given state of facts would constitute a crime thereunder, is a question we need not here determine, as we think the remainder of the statute does prohibit acts which the appellant has committed. He has maintained an office and place of business in front of and on the doors of which he has caused his name to be lettered, with the words, "Physician," and "Dr." and has otherwise advertised a title which tended to show that he was a lawful practitioner of medicine and surgery under the laws of the state of Washington, when in fact he was not such a practitioner. It is competent for the legislature to prohibit acts of this kind. Its purpose in so doing is to protect the people against deception. The titles which the statute sets out are those usually associated with practitioners of the regular schools who treat

diseases by the administration of remedies in the nature of drugs and their compounds, rather than with practitioners who treat solely by appeals to divinity, the occult, or by "manually manipulating the limbs, muscles, and nerves, and by flexing and manually manipulating the joints of the body," and it is practitioners of the regular schools rather than the others that the ill and infirm seeking relief usually expect to find when entering a room whose door has lettered upon it the name of a person preceded by the title "Dr." or followed by the letters "M. D." or "Physician and Surgeon."

The appellant, it is true, prefixed to the word "physician" the words "Osteopathic and Magnetic" in one instance, and the word "Drugless" in another; but these do not make the use of the word lawful. The statute is a prohibition against any use of the word in connection with announcements of the profession or business of a person other than practitioners of medicine and surgery who have passed the examination prescribed in the statute and received the license therein provided for, and this prohibition is not evaded by the use of qualifying adjectives prefixed to the prohibited words. The statute also uses the word "doctor" instead of the more common abbreviation "Dr.", but it is equally a prohibition against the use of either. Its purpose being to prevent deception, the courts will give to it that meaning which will most effectually accomplish that purpose.

It is said, however, that the part of the statute here in consideration could not lawfully be enacted under an act entitled "An act to regulate the practice of medicine and surgery in the state of Washington," etc., but we think the title sufficiently broad. To provide who may lawfully call themselves "Doctors," "Physicians," or "Surgeons," is clearly within the title of an act entitled "An act to regulate the practice of medicine and surgery."

The judgment is affirmed.

HADLEY, C. J., RUDKIN, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7618. Decided November 18, 1908.]

BANAGETAS ANUSTASAKAS *et al.*, *Respondents*, v. INTERNATIONAL CONTRACT COMPANY, *Appellant*.[1]

DEATH—ACTION—DISMISSAL AND NONSUIT—PARTIES—INFANTS—APPOINTMENT OF GUARDIAN. In an action for wrongful death, the fact that the guardian of minor plaintiffs was not properly appointed, would not be ground for a nonsuit, where the complaint stated a cause of action in favor of the widow.

SAME—ACTIONS—PERSONS ENTITLED TO MAINTAIN—ALIENS. Nonresident aliens may maintain an action for wrongful death under our statutes authorizing an action for the benefit of the widow and children.

Appeal from an order of the superior court for King county, Gilliam, J., entered May 7, 1908, granting a new trial, after a nonsuit in an action for wrongful death. Affirmed.

Roberts & Hulbert and *Ballinger, Ronald, Battle & Tennant*, for appellant.

Edward Brady, for respondents.

RUDKIN, J.—This action was instituted by the widow and minor children of G. K. Anustasakas, deceased, to recover damages for his death caused, as is alleged, by the neglect of the defendant. At the close of the plaintiffs' testimony the court granted a nonsuit, but afterwards set aside the nonsuit and granted a new trial. From the latter order this appeal is taken.

There is nothing in the record to indicate the particular grounds upon which either motion was granted, but in support of the nonsuit the appellant contends: (1) That the guardian *ad litem* for the minor respondents was not properly appointed; (2) that there was no proof of negligence on the

[1]Reported in 98 Pac. 93.

part of the appellant; (3) that the deceased assumed the risk; (4) that the deceased was guilty of contributory negligence; and (5) that nonresident aliens have no right of action to recover damages for death by wrongful act or neglect under our statute.

The fact that the guardian *ad litem* was not properly appointed for the minors, if such be the fact, would not authorize a nonsuit, as the complaint stated a cause of action in favor of the widow at least, unless her alienage would defeat a recovery, a question we will discuss later.

The next three questions may be considered together. It appears from the testimony that the deceased met his death while in the employ of the appellant, and that death resulted from injuries received from a cave in, in a ditch in which he was working. In view of a retrial of the action, we deem it unnecessary to discuss the facts further than to say that under the testimony the questions of negligence, contributory negligence, and assumption of risk, were so clearly for the jury that we are constrained to believe that the nonsuit must have been granted on other grounds. *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191, and cases there cited. *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498.

The remaining question is, can a nonresident alien maintain an action to recover damages for death by wrongful act or neglect under our statute. The courts of Pennsylvania, Wisconsin, and Indiana have decided this question in the negative. *Deni v. Pennsylvania R. Co.*, 181 Pa. St. 525, 37 Atl. 558, 59 Am. St. 676; *McMillan v. Spider Lake Sawmill & Lumber Co.*, 115 Wis. 332, 91 N. W. 979, 95 Am. St. 947, 60 L. R. A. 589; *Cleveland etc. R. Co. v. Osgood*, 36 Ind. App. 34, 70 N. E. 839, 73 N. E. 285.

The Federal courts sitting in Pennsylvania, from necessity, follow the decisions of the local courts. *Zeiger v. Pennsylvania R. Co.*, 151 Fed. 348, affirmed in 158 Fed. 809. In *Brannigan v. Union Gold Mining Co.*, 93 Fed. 164, the United States circuit court for Colorado followed the Penn-

sylvania decisions in construing the Colorado statute, and we are informed that the United States circuit court for this state, in a case not reported, followed the Wisconsin decision in construing our statute.* *Woodward v. Michigan etc. R. Co.*, 10 Ohio St. 121; *Texas & Pac. R. Co. v. Richards*, 68 Tex. 375, 4 S. W. 627; *St. Louis etc. R. Co. v. McCormick*, 71 Tex. 660, 9 S. W. 540, 1 L. R. A. 804; *De Harn v. Mexican Nat. R. Co.*, 86 Tex. 68, 23 S. W. 381; and *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 33 S. W. 857, 59 Am. St. 28, 31 L. R. A. 276, cited by appellant from the courts of Ohio and Texas are not in point here, as they simply hold that the statutory right of action will not be enforced by the courts of another state. However, this rule is by no means universal. *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537.

On the other hand, the courts of Massachusetts, New York, Virginia, Illinois, Missouri, Georgia, Alabama, and Tennessee, hold that alienage or nonresidence of the widow or minor children is no defense to actions of this kind. *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 79 Am. St. 309, 54 L. R. A. 934; *Tanas v. Municipal Gas Company*, 88 App. Div. 251, 84 N. Y. Supp. 1053; *Pocahontas Collieries Company v. Rukaes, Adm'r*, 104 Va. 278, 51 S. E. 449; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E. 94, 88 Am. St. 193; *Philpott v. Missouri Pac. R. Co.*, 85 Mo. 164; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Luke v. Calhoun*, 52 Ala. 115; *Chesapeake etc. R. Co. v. Higgins*, 85 Tenn. 620, 4 S. W. 47.

In speaking of the Pennsylvania decisions in *Vetaloro v. Perkins*, 101 Fed. 393, Colt, J., said:

"The decisions of the court in both these cases rest largely upon the proposition that no case can be found in which Lord Campbell's act has been extended to nonresident aliens, and that the act has no extra territorial force. This is hardly in accordance with the fact. A more correct statement, it seems

to me, would be to say that the English courts have never questioned the right of a nonresident alien to maintain an action in the common law courts under Lord Campbell's act."

In *Mulhall v. Fallon, supra*, Holmes, C. J., said:

"The question then becomes one of construction, and of construction upon a point upon which it is probable that the Legislature never thought when they passed the act. In view of the decisions to which we have referred, we lay on one side as too absolute some expressions which are to be found in the English cases, and some of which are cited in *Adam v. British & Foreign Steamship Co.*, 79 L. T. (N. S.) 31. Our different relation to our neighbors politically and territorially is a sufficient ground for a more liberal rule, at least as to inhabitants of the United States.

"One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon nonresident aliens. *Deni v. Pennsylvania Railroad*, 181 Penn. St. 525; *Brannigan v. Union Gold Mining Co.*, 93 Fed. Rep. 164. But compare *Knight v. West Jersey Railroad*, 108 Penn. St. 250. On the other hand, in several states the right of the nonresident to sue is treated as too clear to need extended argument. *Philpott v. Missouri Pacific Railroad*, 85 Mo. 164, 167. *Chesapeake, Ohio & Southwestern Railroad v. Higgins*, 85 Tenn. 620, 622. *Augusta Railway v. Glover*, 92 Ga. 132, 142, 143. *Luke v. Calhoun County*, 52 Ala. 115, 118, 120.

"Under the statute the action for death without conscious suffering takes the place of an action that would have been brought by the employee himself if the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain. St. 1887, c. 270, Sec. 1, cl. 3. In the latter case there would be no exception to the right of recovery if the next of kin were nonresident aliens. It would be strange to read an exception into general words when the wrong is so nearly identical, and when the different provisions are part of one scheme. In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with

reference to the degree of culpability of the employer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in. Whether if the statute were of a different kind we could make a distinction between a mother living just across the boundary line between Massachusetts and Rhode Island and one living in Ireland, need not be considered now."

The plea of alienage is not favored in law, and we are of opinion that the rule which permits nonresident aliens to maintain actions of this kind is supported by the weight of authority, and is more in harmony with the liberal cosmopolitan spirit of the age than the narrow provincial rule which would close our courts to widows and orphans solely because they happen to be nonresident aliens.

The order is therefore affirmed.

HADLEY, C. J., FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7594. Decided November 20, 1908.]

BENJAMIN F. STURGEON, *Respondent*, v. TACOMA EASTERN RAILROAD COMPANY, *Appellant*.[1]

TRIAL — INSTRUCTIONS IN WRITING — STATUTES — CONSTRUCTION. Where a stenographic report of instructions to the jury is made by a stenographer employed by both parties, he is sufficiently under the control of the court to constitute his report "instructions in writing", within the meaning of Laws 1903, p. 119, § 1, requiring written instructions upon demand, provided that a stenographic report of the charge shall be considered a charge in writing. (Overruling *McIntosh v. Sawmill Phoenix*, 49 Wash. 152.)

Appeal from an order of the superior court for Pierce county, Reid, J., entered May 25, 1908, granting a new trial in an action for personal injuries, after a verdict of a jury rendered in favor of the defendant. Reversed.

Hayden & Langhorne, for appellant.

Burkey, O'Brien & Burkey, for respondent.

RUDKIN, J.—This was an action to recover damages for personal injuries. At the conclusion of the testimony the plaintiff requested the court to charge the jury in writing, but the request was refused and the jury were instructed orally. A verdict was thereafter returned in favor of the defendant and the plaintiff moved for a new trial. The new trial was granted for the sole reason that the court erred in refusing to charge the jury in writing as requested; and from the order granting the new trial, this appeal is prosecuted.

It appeared from the bill of exceptions that there was present at the trial, "A stenographer who was in the employ of both parties to report all the proceedings in said cause, and who did report all such proceedings by taking the same down in shorthand, and either of said parties was and is entitled to a transcript of said proceedings by paying the charges of the

[1]Reported in 98 Pac. 87.

stenographer therefor." These facts bring the case squarely within the decision of this court in *Collins v. Huffman*, 48 Wash. 184, 93 Pac. 220. In construing the statute requiring the court to charge the jury in writing when requested to do so the court there said:

"It is next contended that the court instructed the jury orally, and that this was error in view of the fact that appellants had seasonably requested written instructions. The record shows that one stenographer was employed by both parties to report the case at the trial, and that she did report it, including the taking of the court's instructions. She was therefore under the control of both parties. The pertinent part of the statute upon this subject is found in subd. 4, of § 1, Laws 1903, page 119, as follows: 'When the evidence is concluded, either party may request the judge to charge the jury in writing, in which event no other charge or instruction shall be given, except the same be contained in the said written charge; . . . *Provided further*, That whenever in the trial of any cause, a stenographic report of the evidence and the charge and instructions of the court is taken, the taking of such charge or instructions by the stenographic reporter, shall be considered as a charge or instruction in writing within the meaning of this section.' Appellants contend that, on the authority of *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, the instructions as given by the court in the case at bar were not in conformity with the above statute. In the case cited it was said that there were two stenographers present at the trial taking a report of the case, one employed on behalf of the prosecuting attorney and the other by the defendant. Under such circumstances it was held that the court was not relieved from the obligation to charge the jury in writing, the request therefore having been made. It was stated in effect that, in order to relieve the court of this obligation, the stenographer present must be an official stenographer, and one under the direction and control of the court, 'so that a copy of the charge could be had if application to the court should be made therefor.' It was held that a stenographer employed by one of the parties only is not so under the control of the court that he can be required to furnish a copy of any part of the proceedings either to the court or to the opposing party. The holding was based upon the ground that the report of a stenographer employed

by one party only becomes the private property of that party, which is no doubt correct. Appellants contend here that the stenographer employed in this case was not under the control of the court, and was not an official stenographer. Strictly speaking there is, under our statutes, no such person as an official court stenographer, but a stenographer may be so related to both parties in a cause as virtually places him under the direction of the court. We think this is true where one stenographer is employed by both parties to report a trial. Such a reporter is under the direction of either party, and if the interest or advantage of either party requires that copies of instructions which the reporter has taken shall be furnished to the court or to such party, the copies must be forthcoming. If the statute quoted is to be given any force at all, it would seem that the court complied with its provisions in this case. The statute was passed with knowledge that we have no official stenographers, and in view of that fact we think it was intended to meet just such cases as the one at bar. This holding in no way conflicts with *State v. Mayo, supra*, the facts of which were materially different from those now before us."

There is at least apparent conflict between the decision just cited and the language of the court in *McIntosh v. Sawmill Phoenix*, 49 Wash. 152, 94 Pac. 930; but in the latter case the judgment was reversed on other grounds, and the failure of the court to charge the jury in writing was only referred to incidentally. If the object of the statute requiring written instructions is to enable parties to present to the appellate court the rulings of the court below in the very language of that court (*Rising Sun etc. Turnpike Co. v. Conway*, 7 Ind. 187), we think that object is fully satisfied when the charge of the court is taken down by a stenographer in the employ of both parties to the action.

The court therefore erred in granting the new trial for the reason assigned, and for this error the order is reversed, and the cause is remanded with directions to enter judgment on the verdict.

MOUNT, DUNBAR, and ROOT, JJ., concur.
HADLEY, C. J., and CROW, J., took no part.

[No. 7200. Decided November 23, 1908.]

WILLIAM STEWART, *Appellant*, v. ROBERT BALFOUR *et al.*, *Respondents*.[1]

MASTER AND SERVANT—INJURIES—FELLOW SERVANTS—SERVANTS OF OTHER EMPLOYER. Employees of a wheat shipper, engaged on the wharf in delivering sacks of wheat into a chute for loading a ship, are not "loaned" to the stevedores having the contract for loading the ship merely because they are under the direction of the stevedores' workmen, and so are not fellow servants of an employee of the stevedores engaged on the ship in receiving the sacks and loading the ship.

MASTER AND SERVANT—INJURIES—FALL OF SACK IN LOADING SHIP—CONTRIBUTORY NEGLIGENCE—UNSAFE METHOD — EVIDENCE — SUFFICIENCY. An employee of stevedores loading a wheat ship, thrown down from a ladder by the fall of a wheat sack from the dock chute, is guilty of contributory negligence, as a matter of law, precluding any recovery for negligence in placing the sack in the chute, where it appears that he mounted the ladder to place a riffle in the chute while sacks were coming down at the rate of twenty per minute, that sacks frequently fall from the chute, and that he might have directed the men to cease throwing in sacks while he was placing the riffle, and his use of the ladder at all was unusual and unnecessarily dangerous, and a safer way was well known to him.

SAME—ASSUMPTION OF RISKS. In such a case, the plaintiff assumes the risk from the falling of a sack, which he knew happened several times a day, whether the same was due to negligence in placing the sacks in the chute or other causes.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered December 14, 1907, upon the verdict of a jury rendered in favor of the defendants by direction of the court, after a trial on the merits, in an action for personal injuries sustained by an employee loading a ship. Affirmed.

Ellis, Fletcher & Evans, for appellant.

James M. Ashton and *W. H. Hayden*, for respondents.

[1]Reported in 98 Pac. 103.

HADLEY, C. J.—This is an action to recover damages for personal injuries. The plaintiff seeks to recover from the partnership of Balfour, Guthrie & Company. He was at the time in the employ of McCabe & Hamilton, stevedores, in the city of Tacoma. McCabe & Hamilton were employed by the shipowners to load a French sailing ship called the "Bidart," with sacks of wheat, at the defendants' wharf, in Tacoma. It is alleged that the stevedores employed controlled and discharged the men on board the ship who were engaged in loading the same with wheat, and that the defendants did the same with men on the wharf who were engaged in delivering the wheat in sacks into the chute for loading in the ship.

At the time of receiving his injury, the plaintiff was assisting to load the ship under the general direction of the foreman of the stevedores, and under the immediate direction of the sack turner to whom the plaintiff was tender or assistant. The tide was low, and the deck of the vessel was much lower than the level of the surface of the wharf. The ship's rail was about five or five and one-half feet above the deck, and the hatch comb or curb around the hatch in the middle of the deck was about two and one-half or three feet higher than the level of the deck. For the purpose of loading the ship, two chutes were used, one known as the "tongue" chute, being about fourteen feet long, and running at a slight incline from the ship's rail to the hatch comb, the outer end resting upon the ship's rail and the inner end upon a board across the hatch comb known as the sliding board. The other chute, known as the dock chute, was about eighteen or twenty feet long, and extended at a steeper incline from the edge of the wharf to the first mentioned chute, with the lower end of the dock chute resting in the tongue chute at a point two or three feet from the hatch comb, the upper end of the dock chute being on and secured to the wharf. As the ship was lowered by the falling of the tide or by the weight of the accumulating cargo, the incline of the dock chute became steeper, and the

lower end gradually slipped back toward the wharf in the tongue chute.

At the time of the accident there was, also, another unused chute lying alongside the tongue chute, upside down, one end resting upon the ship's rail and the other end upon the hatch comb. The sacks of wheat were brought on trucks with five or six sacks to the load, and two men would take hold of the sacks on either side and place them lengthwise in the upper end of the dock chute so that they would slide down it to the tongue chute and thence along the latter to the sack turner's position at the hatch comb. The duties of the sack turner required him to sit upon a board across the hatch comb at one side of the place where the inner end of the tongue chute rested, and turn the sacks alternately into still two other chutes, which ran down from the hatch into the body of the vessel and conveyed the sacks into the ship below, where other employees of the stevedores were engaged in storing the wheat away in the ship.

The plaintiff was employed by the stevedores as tender or assistant to the sack turner, and he was under the immediate orders and direction of the latter. All the men on board the ship engaged in loading were under the stevedores' foreman, who directed the general operation of stowing away the wheat on the vessel. It was the duty of the plaintiff to obey the orders of the sack turner in keeping the chutes in position and in removing or putting riffles into the chutes. The riffles are thin pieces of board, rounded smoothly at the top, and placed crosswise in the bottom of the chute, the ends resting in grooves cut in the sides of the chute, the grooves extending from the bottom to the top of the chute so that riffles can be dropped in instantly when required. The purpose of the riffles is to render the bottom of the chute more uneven, and by increasing the friction, to retard the speed of the sacks as they descend. More riffles are from time to time inserted as the ship gets lower and the chutes correspondingly steeper.

The man who places the riffles usually stands waiting at the side of the chute, and when the men on the dock have unloaded one truck and while another is coming up, he inserts a riffle, or if there is an immediate necessity, he can drop the riffles into the proper grooves between the sacks as they descend, if they are not coming too rapidly.

The complaint alleges that the tide was low and the descent of the chute was so steep that the sacks came down very swiftly, making it difficult for the sack turner to handle them, and that he ordered the plaintiff to place a riffle in the dock chute, to retard the speed of the sacks; that the plaintiff thereupon secured a ladder and placed one end upon the deck, resting the other end upon the unused, inverted chute, hereinbefore mentioned as lying alongside the tongue chute; that he placed the ladder so that the upper end was some eighteen inches to one side of the two chutes in use, and at least three feet below the dock chute, at a point about six or seven feet from the ship's rail and seven or eight feet from the hatch comb. While the ladder was in this position, he climbed upon it for the purpose of placing a riffle in the chute, and he alleges that, when about half way up the ladder, the two men upon the dock, and who were placing the sacks in the dock chute, carelessly and recklessly threw a sack of wheat upon the side of the chute so that it hung partly out of it, and in that position it slipped rapidly down, hanging over the side until immediately above the place where the ladder was standing, when it fell clear off the chute, struck the ladder, knocked it from its position under plaintiff, and threw him with great force to the deck below, whereby he was injured.

The defendant answered that the plaintiff's own negligence led to his injury, and also that he well knew that, in the ordinary loading of the vessel with the appliances then used, it was a common thing for sacks of wheat to fall out of the chutes upon the deck; that he knew the construction and arrangement of the chutes and ladder, and knew and appreciated all the risks and dangers connected with the same; and that

they were incident to the service then being performed by him. The cause came on for trial before a jury, and at the close of the testimony, the defendants moved for an instructed verdict in their favor. The motion was granted. A verdict was returned for the defendants, and judgment was entered accordingly. The plaintiff has appealed.

A number of grounds for this instructed verdict were specified in the respondents' motion, but the record does not disclose upon what particular ground the court based its ruling. Appellant says in his brief that the trial court held that the two men upon the wharf at the head of the chute who were delivering the wheat into the chute were, for the time being, fellow servants of the appellant, and that respondents are for that reason not liable. We will first examine this question. It is established that appellant was in the employ of the stevedores and subject to the direction of their foreman, and more immediately, of the sack turner. The two men upon the wharf who threw the sacks into the chute were in the employ of the respondents, and were paid by them. For the time being, however, they were subject to the directions of the stevedores, the latter having control of the situation there while the ship was being loaded. Respondents' men brought the wheat to the edge of the wharf and delivered it into the chute, but it was agreed by all parties concerned, and all, including the appellant, well knew, that the men upon the wharf were at all times, while the loading was going on, subject to the directions of the stevedores. If they were delivering the sacks too rapidly or too slowly to suit the convenience of the stevedores, they acted upon the orders of the latter and decreased or increased the speed of delivery as the orders required. If the surface of the chute became so dry and smooth that the sacks slid too rapidly, and if the stevedores desired to correct that by inserting riffles in the chute, as hereinbefore explained, the men upon the wharf ceased delivering sacks, if ordered so to do, while the riffles were being placed. The duty of giving the order to so cease delivering the sacks rested upon the ap-

pellant. Such an order might be communicated to appellant by the foreman or by the sack turner of the stevedores, both of whom were his superiors; but he was also authorized to give the order himself and of his own motion when it became necessary for the purpose of inserting the riffles.

Under these circumstances, respondents argue that the men upon the wharf were, for the time being, loaned by them to the stevedores, and that respondents cannot be liable for their acts during that time. We think it should not be said that there was an absolute loan of the servants in the sense in which that term is sometimes used with reference to a shifting of employees. They were still the servants of respondents and were delivering the respondents' wheat into the chute. Except in so far as they were subject to the direction of the stevedores, they represented their own masters, the respondents, at that particular place. In so far as the stevedores were responsible for their control, the respondents cannot be held liable; that is to say, if the stevedores or their employees neglected to properly instruct or order the men how to regulate the speed of the sacks or when to cease throwing them into the chute so as to serve the purposes of safety, then respondents cannot be liable for what may have resulted from such neglect of the stevedores. If, however, the employees of respondents so carelessly threw the sack in that it hung over the side and created a dangerous condition, the act was one not directed or in any way controlled by the stevedores, but it was simply the careless act of respondents' employees while they stood in the position of their master discharging a duty for the latter. Such is the character of the negligence charged in the complaint, and we think the proofs were such that it should not be held, as a matter of law, that respondents' servants, for the purposes of the negligent act here charged, were loaned to and under the control of the stevedores.

Respondents insist that appellant's own negligence was the proximate cause of his injury, and that it should be so held as a matter of law. We have read the evidence, and find that

it was entirely within the power of appellant to direct the men to cease throwing in the sacks while he inserted the riffles. He well knew that he could control the men for that purpose, but he made no effort to do so. He undertook to insert the riffles in the bottom of the chute while the sacks were coming down at the rate of twelve hundred per hour, or twenty per minute. He knew it was a common thing for sacks to fall over the side of the chute, a thing which often happened several times a day, and of course no one could anticipate just what moment it would happen. He took a ladder and placed it so that its top projected above the unused chute against which it rested and so as to receive the force of a sack if it should fall over the side of the chute above it. The use of a ladder for the purpose was, as the evidence discloses, an almost unheard of thing. Practically all of the witnesses testified that they had never seen a ladder used for that purpose. The almost universal way of reaching the dock chute, when a riffle is to be inserted, is to step up on the unused or inverted chute, which served as a kind of platform upon which to stand while adjusting the riffle in the dock chute above. The height of this platform at the hatch comb end was about two and one-half or three feet, and it could be easily reached without a ladder, after which one could walk along it as it sloped toward the top of the ship's rail, and could easily reach into the dock chute above and insert the riffles.

But notwithstanding this appliance and the custom as to its use, which was well known to appellant, he chose the use of the ladder, placed it in a dangerous position where it was liable to be struck by a falling sack any instant, ascended the ladder, gave no order for the rapid movement of the sacks to cease, and while he stood upon the ladder, the bounding sack struck it and knocked it down. It seems to us that the minds of reasonable jurors could not have failed to agree that appellant's injury was due to his own contributory negligence; and such being the case, it was the duty of the trial court to so hold as a matter of law. The granting of the motion for

an instructed verdict had that effect, as respondents asked the instruction on that ground among others.

Appellant argues that, if the sack had been properly placed in the chute, it would not have fallen over, and that it was the neglect of respondents' servants that it was improperly put into the chute. He claims he had a right to presume that the sacks would be properly placed in the chute. Whether the falling of sacks resulted from actual negligence, or whether it resulted from a mere occasional condition incidental to the rapid handling and movement of the sacks which even ordinary care could not at all times prevent, the fact remains in either event that appellant knew it was a thing that was liable to happen a number of times in the course of a day. He must, therefore, be held to have assumed the risks attending the peculiar situation as he stood upon the ladder. It was within his power to take the usual and manifestly safer course, and also to order the movement of the sacks to cease. Since he did neither, and since he knew from observation and experience that a sack was liable to fall any instant, he cannot be heard to say that he did not assume the risk of such a situation. He could easily have made the situation safe, and he well knew how to do it; but having chosen to do otherwise, he cannot now say that he did not assume the consequences of the course which he took.

The judgment is affirmed.

RUDKIN, DUNBAR, ROOT, CROW, and MOUNT, JJ., concur.

FULLERTON, J., took no part.

[No. 7346. Decided November 23, 1908.]

OVID E. BILLINGS *et al.*, *Respondents*, v. THE CITY OF SNOHOMISH, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—DEFECTIVE SIDEWALK — EVIDENCE—SUFFICIENCY. A walk is shown to be dangerous where a stringer had entirely rotted away, so that, when a plank was stepped on at one end by plaintiff's companion, the other end raised up and tripped the plaintiff.

SAME—CONSTRUCTIVE NOTICE OF DEFECT. Constructive notice on the part of a city of a defective sidewalk is sufficiently shown where the walk had been constructed five years, and for some months ends of the boards had rotted away for a foot or more, and decayed on the under side leaving a thin shell, the nails had pulled out, and the boards were so loose that they rattled when walked on.

TRIAL—MISCONDUCT OF COUNSEL. Evidence that a new walk had been laid, since an accident on a defective sidewalk, is not shown to have been deliberately planned to prejudice the jury by a remark of counsel that they expected to ask to have it struck out, where it was brought out incidentally on cross-examination.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Striking out evidence that a new walk had been laid since an accident on a defective walk, and instructing the jury to disregard it, cures error in its admission.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,500 for a slight abrasion of the knees, sustained in tripping on a defective sidewalk, the same healing at once and causing no subsequent trouble, unless neurasthenia resulted from the shock, for which condition there were other more probable causes, is excessive, and should be reduced to $2,000.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered October 19, 1907, upon the verdict of a jury rendered in favor of the plaintiff for the sum of $3,500, for injuries sustained in a fall upon a defective sidewalk. Reversed, and a new trial ordered unless $1,500 of the verdict is remitted.

M. J. McGuinness and *Robert McMurchie*, for appellant.

J. Y. Kennedy and *Hathaway & Alston*, for respondents.

[1]Reported in 98 Pac. 107.

FULLERTON, J.—This is an appeal by the city of Snohomish from a judgment entered against it in an action brought by the respondents, who are husband and wife, to recover for personal injuries received by the wife from a fall on the sidewalk of the appellant city. The first three assignments of error challenge the sufficiency of the evidence to justify the verdict. The injured respondent tripped over a board in the walk, which was raised up immediately in front of her by being stepped upon at the other end by the person with whom she was walking.

It is contended that there was no evidence tending to show that the walk at the place of the accident was not reasonably safe for public travel, nor was there any evidence tending to show that the city had notice, either actual or constructive, of the actual condition of the walk. That the walk was so far defective as to render it unsafe for public travel at the place of the accident, it seems to us the evidence leaves no doubt. The walk was originally constructed by laying three stringers parallel with the course of the street, and nailing boards crosswise thereon. At the time of the accident the stringer next to the property line had entirely rotted away, and the one next the street had so far decayed as to allow one of the boards forming the walk to sink below its original level when stepped upon. The effect was that the boards when stepped upon at one end would raise at the other, thus tending to trip any one who might be passing at that time. Manifestly such a condition renders a walk unsafe.

Whether the city had knowledge of the defect, or could have learned of it by the exercise of reasonable diligence, the evidence is not so clear, but we think it sufficient to sustain the finding of the jury that the city did have such knowledge. The evidence of the respondent, in addition to showing the condition of the stringers as above recited, tended further to show that the walk had been down something over five years; that the ends of the boards next the property line had rotted away for a foot or more, and for some distance further had

decayed on the under side until only a shell remained; that the stringer next the street had decayed on the inner side, leaving a thin shell to support the boards, and that this shell had been crushed down beneath the board over which the respondent received her injury; that the nails that originally held the board to the stringers had pulled out in part, leaving the walk in a loose condition, so that it rattled when walked upon; and that it had been in this condition for some months before the accident. This if believed by the jury warranted a finding that the city had constructive notice of the defect. The city officers must exercise reasonable diligence in the care of the city's walks. They must take notice that constant use will gradually wear out a walk; that nails will pull and supports decay; and that at best the life of a wooden sidewalk is limited to but a few years. It is not enough that they may find that the surface of the walk appears sound. The walk as an entirety must be examined and kept in repair if the city is to escape the charge of negligence. There was, therefore, no error on the part of the court in refusing to sustain the several challenges made to the sufficiency of the evidence.

On cross-examination of certain of the city's witnesses, it developed that a new sidewalk had been constructed at the site of the accident, but whether by the city or the abutting property owner was not shown. At the conclusion of the evidence, the city moved to strike from the evidence and withdraw from the consideration of the jury all reference to the new walk, and asked the court to instruct the jury to disregard it in making up their verdict. This motion not only was not resisted by the respondents' counsel, but one of them remarked that "if the defendant had not asked that instruction the plaintiffs would probably have asked it." The appellant insists that it is plainly apparent from this remark and conduct of counsel concerning this testimony that they deliberately planned to have the jury hear it, knowing it to be improper, and then have the jury instructed to disregard it, hoping thereby to have all the benefit of such prejudicial

testimony without any of the responsibility attached to its introduction. But we find nothing in the record that justifies this charge. The fact was brought into the case incidentally, on cross-examination of a witness by respondents' counsel, and, so far as we are able to discover, without any intent on the part of counsel to get improper evidence before the jury. We interpret this remark to mean nothing more than an assent to the motion made by the appellant.

The trial judge granted the motion to strike this evidence and afterwards instructed the jury not to consider it as evidence of the defendant's negligence. This cured any error in its admission. This court, it is true, in the case of *Carter v. Seattle*, 21 Wash. 585, 59 Pac. 500, held that the fact that the municipality had repaired a walk after an accident therein causing an injury, was not evidence that the municipality had been negligent in its care of the walk prior to the accident, and reversed the judgment because such evidence had been admitted. But this was done in a case where the evidence was offered for the purpose of showing negligence, and where the court had instructed the jury that they might consider the fact in determining whether or not the municipality was negligent. It was not a case where the court attempted to cure the error. It is the almost universal rule that error in the admission of improper evidence is cured where the evidence is afterwards withdrawn and the jury are instructed not to consider it. This court has many times so held. *Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472, 7 Pac. 882, 886; *Lytz v. Keevey*, 5 Wash. 606, 32 Pac. 534; *Zelinsky v. Price*, 8 Wash. 256, 36 Pac. 28; *Smith v. Buckman*, 22 Wash. 299, 61 Pac. 31; *Brown v. Pierce County*, 28 Wash. 345, 68 Pac. 872; *Wilson v. West & Slade Mill Co.*, 28 Wash. 312, 68 Pac. 716; *Hart v. Cascade Timber Co.*, 39 Wash. 279, 81 Pac. 738.

The contention that the verdict is excessive we think has merit. The fall produced no objective manifestation of physical injury, save a slight abrasion of skin on one of the

knees, which healed at once, causing no subsequent trouble. The injured respondent, however, gradually developed a case of neurasthenia, which the medical witnesses stated might have been induced by the shock received from the fall. But the record shows that the respondent had been subjected to a capital surgical operation, following which she had engaged for a considerable time in duties calling for much physical exertion; conditions which, as we understand the medical witnesses, were much more liable to cause her present condition than the shock received from the fall on the walk. We think the jury failed to take into consideration these circumstances in rendering the verdict, and that had they done so a much less sum would have been returned. The verdict should be reduced to two thousand dollars.

The judgment will therefore be reversed, and the cause remanded with instructions to enter a judgment in favor of the respondents for two thousand dollars, in case they file a written consent with the clerk of the lower court within thirty days after they receive notice that the remittitur has reached that court that they accept that sum in lieu of the judgment rendered; but if they fail to file such consent within the time limited, then to grant a new trial. Neither party will recover costs on this appeal.

HADLEY, C. J., RUDKIN, and MOUNT, JJ., concur.

DUNBAR and CROW, JJ., took no part.

[No. 7488. Decided November 23, 1908.]

LENA MESSIR, *Appellant*, v. JOHN H. McLEAN, *Respondent*.[1]

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. There is sufficient evidence of negligence on the part of a hotel keeper, in failing to maintain a safe place in which to work, where it appears that the linoleum on the floor of a room was so old and worn full of holes that it was unsafe to walk on, whereby a chambermaid, in the performance of her duties, was tripped and thrown down a step; and the question is for the jury where there was conflicting evidence.

TRIAL—NEW TRIAL—PROVINCE OF COURT AND JURY. If the trial court considers the evidence was insufficient to sustain a verdict for the plaintiff, it may grant a new trial, but it cannot for such reason direct a verdict for the defendant, if the evidence is conflicting.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 20, 1908, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee. Reversed.

McCafferty & Godfrey, for appellant.

FULLERTON, J.—The appellant, plaintiff below, brought this action against the respondent to recover for personal injuries received by her while in the respondent's employ, caused, as she alleges, by the respondent's negligence. Issue was taken on the allegations of negligence contained in the complaint, and the defense of contributory negligence interposed, which was denied by a reply. On the issues made, a trial was entered upon before the court and a jury. At the conclusion of the appellant's case, a challenge was interposed to the sufficiency of the evidence, which challenge the trial court overruled. Evidence in support of the respondent's answer, and in rebuttal thereof, was introduced, and the cause submitted to the jury under instructions to which no exceptions

[1]Reported in 98 Pac. 106.

were taken. The jury returned a verdict in favor of the appellant in the sum of $2,000, after which a motion for a new trial and for judgment notwithstanding the verdict was made. The trial judge overruled the motion for a new trial, but granted the motion for judgment notwithstanding the verdict, and entered a judgment to the effect that the appellant take nothing by her action, and that the respondent recover his costs. This appeal was taken from the judgment so entered.

The record does not disclose the reasons which actuated the trial court in granting the motion for judgment notwithstanding the verdict, nor have we been favored with a brief or argument on the part of the respondent. The motion for judgment itself states no specific ground for granting the judgment, but is couched in general language, followed by a recital that it "is based upon the records, files and pleadings herein, and upon the evidence introduced and proceedings pending the trial hereof, and upon all papers, records, and proceedings herein prior to the rendition of such verdict, and the rulings of the court therein and thereon." We have been left therefore, in so far as the respondent's case is concerned, to our own researches.

But we are unable, after a careful examination of the record, to discover any ground upon which the judgment entered can be sustained. The evidence of the appellant was to the effect that she was employed as a chambermaid to care for the guest rooms on the top floor of a hotel conducted by the respondent; that the linoleum covering the floor of a certain room which she was obliged to enter in the performance of her duties had been suffered to become old and worn, and full of holes, rendering it unsafe to walk upon; that she, in performance of her duties, not knowing the condition of the linoleum, walked over it while carrying heavy pitchers of water, caught her foot in one of the holes, and was thrown through a door down a step, which was some ten inches high, to the floor, dislocating and otherwise injuring her shoulder. In her statement as to the manner of her injury and as to

the condition of the linoleum at that time, she was corroborated by other witnesses; one of them testifying that the linoleum had been out of repair and dangerous for several weeks, and had been called to the attention of the housekeeper, whose duty it seems to have been to report defects of this kind to the management so that they might be repaired. This was sufficient to make a case for the jury. The proprietor of a hotel, like any other employer of labor, must furnish his servants a reasonably safe place in which to work, and must keep the place reasonably safe as long as he requires them to work therein. Any failure on his part to perform this duty which results in an injury to a servant renders him liable to respond in damages. In this case the evidence on the part of the appellant tended to show that this duty had not been performed, and that the appellant had received an injury as the result of neglect in that regard. True, the evidence on the part of the respondent tended to show that the place complained of as unsafe was reasonably safe, and that the injury was the result of the appellant's own negligence. But this left a question for the jury, not the judge, to determine, and it was error on the part of the court to grant judgment notwithstanding the verdict. Of course, if the judge was of the opinion that the evidence preponderated in favor of the respondent, it was his province to grant a new trial so that the question of fact might be submitted to another jury, but it was not his province for any such reason to take the question from the jury and determine it as a finality himself.

The judgment appealed from will be reversed, and the cause remanded with instructions to enter a judgment on the verdict for the plaintiff, appellant in this court.

RUDKIN, MOUNT, DUNBAR, and CROW, JJ., concur.

[No. 7660. Decided November 23, 1908.]

FRANK TWITCHELL, *as Executor of the Estate of Mary E. Twitchell, Deceased, Respondent*, v. RIAL BENJAMIN *et al., Appellants.*[1]

VENDOR AND PURCHASER—RIGHTS OF VENDEE—CONVERSION—REMOVAL OF BUILDING—LIABILITY. One is liable for a conversion where he was under contract to purchase land and made improvements converting a barn into a dwelling, and pending efforts to perfect title removed the same and refused to pay therefor or buy the land after the title was perfected.

SAME—DEFENSES—CONSENT TO REMOVAL. In such a case it is no defense that the vendor consented to the removal of the barn, not intending a gift; as there arose an implied promise to pay its value.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 15, 1908, in favor of the plaintiff, in an action for conversion, after a trial before the court without a jury. Affirmed.

E. W. Howell, for appellants.

Reeves Aylmore, for respondent.

FULLERTON, J.—This action was instituted to recover the value of a barn which it is alleged the appellants removed from the premises of the respondent's testatrix to premises of his own, and converted to his own use. The cause was tried by the court without a jury, and resulted in a judgment in favor of the respondent.

The evidence on the part of the respondent tended to show that the respondent's testatrix and appellants entered into a contract by the terms of which the testatrix agreed to sell and convey to the appellants a certain tract of land on which the barn was situated; that the appellants took possession of land and barn and changed the barn into a house, expending thereon quite a large sum of money; that there were clouds on the title to the land, which the appellants feared might not

[1]Reported in 98 Pac. 109.

be successfully removed, whereupon they removed the barn to premises of their own; and that, when the title was perfected in the testatrix to the land, they refused to carry out their agreement to purchase the lot. These facts justify the judgment of the court.

The appellants set up as a defense to the action, and there was evidence in the record tending to prove, that Mrs. Twitchell did not object to the moving of the barn at the time it was moved, but in fact assented thereto, in fear herself that the title to the lot might fail and the appellants lose the money they had expended in remodeling the barn. But if this were true, it would not require a reversal of the judgment. There is nothing in the record tending to show that a gift of the barn was intended. When, therefore, the appellants removed the barn, there arose an implied promise that they would pay for it such sum as it was reasonably worth, and nothing more than the reasonable value of the barn was awarded the respondent by the judgment of the trial court.

On either theory of the case, the judgment was right and will stand affirmed.

RUDKIN, DUNBAR, and MOUNT, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

[No. 7667. Decided November 23, 1908.]

F. J. DUSKEY, *Respondent*, v. GREEN LAKE SHINGLE COMPANY, *Appellant*.[1]

APPEAL—RECORD—OBJECTIONS. Error cannot be assigned on permitting an amendment to the complaint where the record does not disclose the ruling.

MASTER AND SERVANT—NEGLIGENCE—ISSUES AND PROOF. In an action for injuries to the operator of a shingle machine, evidence of negligence as to the use of a "filled-in" table, and in permitting children in the mill, is admissible where charged as negligence in the complaint.

EVIDENCE—MORTALITY TABLES—ADMISSIBILITY. Upon an issue as to permanent, although only partial, disability by reason of the loss of fingers, mortality tables are admissible.

APPEAL—REVIEW—INSTRUCTIONS COVERED IN GENERAL CHARGE. It is not error to refuse instructions covered in the general charge.

DAMAGES—INSTRUCTIONS—PREVIOUS DISABILITY—EARNING CAPACITY. An instruction to consider the difference in the earning capacity of the plaintiff before and after the accident, for loss of fingers, covers consideration of the fact that he had already lost the tips of his fingers in a previous accident.

MASTER AND SERVANT—DANGEROUS MACHINERY—ASSUMPTION OF RISKS—PROMISE TO REPAIR—EVIDENCE—SUFFICIENCY. The question of negligence and assumption of risks is for the jury where there was evidence that the operator of a shingle machine lost his fingers by reason of the open condition of the table, which was unsafe and which the employer had promised to repair or "fill-in", and that plaintiff continued work for but a short time in reliance on the promise; although there were inconsistencies in the plaintiff's claims, and it appeared that he was experienced and had worked on the machine about a year, and only made complaint in a moment of anger two days before the accident.

DAMAGES—INJURIES—EXCESSIVE VERDICT. A verdict for $2.080, for the loss of the tips of four fingers of the left hand of a man 28 years of age, impairing his earning capacity to the extent of one dollar a day, is not excessive.

ROOT, J. dissenting.

[1]Reported in 98 Pac. 99.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 9, 1908, upon a verdict rendered in favor of the plaintiff, in an action for injuries sustained by the operator of a shingle machine. Affirmed.

Geo. W. Saulsberry (*J. P. Wall* and *L. Y. Devries*, of counsel), for appellant.

Willett & Willett, for respondent.

RUDKIN, J.—This action was instituted to recover damages for personal injuries sustained by the plaintiff while operating a double-block shingle machine, in the defendant's mill, in the city of Seattle. The negligence charged in the complaint was: (1) That the shingle machine was not properly guarded so as to prevent the hand of the operator from being caught and carried into the saw; (2) that the defendant carelessly and negligently employed and kept in its employ negligent and incompetent servants; and (3) that the defendant carelessly and negligently suffered and permitted children to enter and remain in its mill. The answer denied the negligence charged in the complaint, and alleged negligence of fellow servants, contributory negligence, and assumption of risk. The affirmative answer was denied by reply, and the case came on for trial. The jury returned a verdict in favor of the plaintiff in the sum of $2,080, and from the judgment entered on this verdict, the defendant has appealed.

It is first contended that the court erred in permitting the filing of a second amended complaint. The record discloses no ruling on this question in the court below. For aught that appears, the amended complaint may have been filed by consent; hence we cannot consider this assignment.

It is next contended that the court erred in admitting testimony in reference to a "filled-in" table, and in reference to children coming into the mill. These were two of the grounds of negligence charged in the complaint; counsel has sug-

gested no reason why respondent should not have been permitted to prove them, if he could, and we perceive none.

It is next contended that the court erred in admitting life expectancy or mortality tables in evidence. The testimony tended to show that the respondent lost the tips of all four fingers of the left hand, and that such injury constituted a permanent, though only partial, disability. Under such circumstances the tables were properly admitted.

It is next contended that the court erred in refusing to give certain requested instructions relating to the defenses of assumption of risk and negligence of fellow servants. An examination of the record shows that instructions on these points, fully as favorable to the appellant as those requested by it, were embodied in the general charge of the court.

It is next contended that the court erred in refusing to instruct the jury that they should consider the previous loss of the tips of some of the same fingers. The record discloses no request for such an instruction; but in any event we think the court did so charge in effect when it told the jury to consider the difference in the earning capacity of the respondent before and after the accident.

It is next contended that the court erred in refusing to direct a verdict in favor of the appellant at the close of the testimony. The case made by the respondent is not a strong one. The chief ground of negligence charged in the original and first amended complaint was that the respondent had neither notice nor knowledge that the machine was not properly constructed, and that he was not instructed in the proper use of the machine; in his second amended complaint the respondent alleged that he had full knowledge of the faulty construction of the machine, that he threatened to quit work a few days before the accident unless the machine was repaired or "filled-in," and that he thereafter remained in the employ of the appellant only because the foreman promised to make the desired repairs; and at the trial the respondent qualified as an expert of many years experience in the operation of

such machinery. It further appears that he worked on the same machine for almost a year before the accident, and for two or three weeks after the accident, and that his only complaint as to its faulty construction was made fortuitously in a moment of anger about two days before the accident. But while these inconsistencies in positions and conduct might furnish strong reasons why the jury should have returned a different verdict, they furnish no reason why an appellate court should set aside a verdict which is sustained by competent testimony; and we are constrained to hold that there was such testimony in this case. There was testimony tending to show that an open table machine is unsafe, that the appellant promised to repair or "fill in" the table, that the respondent continued to operate the machine in reliance upon this promise, that he was injured very soon after the promise to repair was given, without fault on his part, and that the injury was caused by the defective condition of the machine and would not have occurred had the promised repairs been made.

The last error assigned is the overruling of a motion for a new trial. The only new question presented by the motion is the claim of excessive damages. The testimony tended to show that the earning capacity of the respondent, a man of 28 years of age, was impaired by the injury to the extent of about $1 per day; and in view of his age and the nature and extent of the injury, we cannot say that the verdict is excessive.

Finding no error in the record, the judgment is affirmed.

FULLERTON, DUNBAR, and MOUNT, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

ROOT, J., dissents.

[No. 7671. Decided November 23, 1908.]

L. S. GREEN, *Respondent*, v. THE CITY OF BALLARD, *Appellant*.[1]

CONTRACTS—CONSTRUCTION—FOR SINKING WELL—TEST OF CAPACITY—PERFORMANCE. In a contract for sinking city wells, agreed to produce 1,500,000 gallons per day for a period of fourteen months, a clause providing that, after a certain payment upon obtaining a supply of 800,000 gallons a day, the contractor shall be paid the balance when successful in obtaining a supply equal to 1,500,000 gallons per day of twenty-four hours, "when tests are made and work accepted by the city council," requires that the character of the well for the entire period must be ascertained by test, and upon a successful test made by authority of the council for six days, the contractor is entitled to the full contract price before the expiration of the fourteen months.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 14, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on contract. Affirmed.

Scott Calhoun and *H. D. Hughes*, for appellant.

Jay C. Allen, for respondent.

RUDKIN, J.—This action was instituted to recover the contract price for sinking a well, under the following agreement entered into between the plaintiff and the defendant city:

"This contract made on this 12 day of February, 1906, between the city of Ballard, a municipal corporation of the state of Washington, party of the first part, and L. S. Green of the city of Seattle, party of the second part;

"Witnesseth: That for and in consideration of the promise and stipulations hereinafter made, and in consideration of the payments hereinafter specified, it is agreed between the parties hereto:

"(1) The party of the second part promises and agrees with the party of the first part, to sink wells at such places

[1]Reported in 98 Pac. 95.

upon the public streets or alleys of the party of the first part as the party of the second part may select, and pipe the water obtained from such wells underground to a point at or near the present pumping station of the party of the first part, and to conduct all such wells to a main suction pipe, and lead the water supply to a pit at or near said pumping station, so that said wells when completed and properly pumped will furnish one million five hundred thousand (1,500,000) gallons of water per day of twenty-four hours, the water to be of a quality similar to that of the water now obtained from the artesian well of the Ballard Lumber Company in the city of Ballard, and similar to that of the good wells of the city of Ballard. The party of the second part agrees that the wells so to be sunk by him, will furnish a supply of water of such quality equal to eight hundred thousand gallons per day of twenty-four hours at said point when properly pumped within ninety (90) days after the date of this contract; the ninety (90) days to be ninety (90) full working days, and not to include any holidays, or days when the weather or elements are such as not to permit the party of the second part to work, or any delays on account of strikes. All the materials, casing and piping used in the drilling and piping of said wells is to be furnished by the party of the second part at his own expense. Said work and said materials to be in all respects in accordance with the specifications now on file in the office of the clerk of the city of Ballard, which are hereby referred to and made a part of this contract.

"(2) The party of the second part shall have the right in piping the said water from said wells to the point above referred to, to go along and upon any street or alley of the said city of Ballard, and shall lay said pipe or pipes along said streets or alleys, and underneath or below the surface thereof.

"(3) The party of the first part is to furnish to the party of the second part free of charge, all water necessary to be used by him in doing said work.

"(4) The party of the second part guarantees water of the quality similar to that furnished by the artesian well of the Ballard Lumber Company, and of the good wells of the city of Ballard.

"(5) Should the said party of the second part be successful in sinking or drilling wells, which will furnish, when

properly pumped, one million five hundred thousand (1,500,000) gallons of water, of the quality above referred to, per day of twenty-four hours, as proved by test, party of the first part agrees to pay him therefor at the rate of two cents (2c) per one hundred (100) cubic feet for all the water which said wells are capable of furnishing, for a period of fourteen (14) months (not exceeding one million five hundred thousand (1,500,000) gallons per day). Should, however, the party of the second part succeed in obtaining a supply of at least eight hundred thousand (800,000) gallons of water of such quality per day of twenty-four hours only from the said wells, when properly pumped, within a period of ninety (90) days, from the date of this contract, said days to be computed as above set forth, then the party of the first part is to pay the party of the second part therefor, immediately after test and acceptance of work by the city council has been made, a sum equal to seventy-five per cent (75 per cent) of the amount due for eight hundred thousand (800,000) gallons as proved by test, for a period of fourteen months (14) figured at the rate of two cents (2c) per one hundred cubic feet. The party of the second part is to proceed with said work, however, in an endeavor to increase said supply to at least one million five hundred thousand (1,500,000) gallons of water per day of twenty-four (24) hours, and when he shall be successful in obtaining a supply of water of such quality equal to one million five hundred thousand (1,500,000) gallons per day of twenty-four (24) hours, then the balance of the contract price, to wit: the balance of the amount due for said eight hundred thousand (800,000) gallons, and the amount due for the remaining seven hundred thousand (700,000) gallons for the period of fourteen (14) months, at the rate of two (2c) cents per one hundred cubic feet, shall be paid to the party of the second part, or to his order when tests are made and work accepted by the city council.

"(6) The party of the first part agrees to, and it shall provide and maintain a fund, to be known as the 'Water Extension Fund' into which there shall be paid forty per cent (40 per cent) of the gross revenues received by the party of the first part from sales of water, and water rentals, and shall keep said fund intact and irreducible, until the warrants or bonds hereinafter referred to are fully paid and discharged.

"(7) The payment for the work aforesaid shall be made to the party of the second part in warrants or bonds, drawn by the party of the first part, payable to the order of the party of the second part, on and out of said 'Water Extension Fund,' to be so provided and maintained as hereinbefore agreed, said warrant or bond shall draw interest from their date until paid at the rate of eight per cent (8 per cent) per annum.

"(8) The party of the second part is to furnish the party of the first part a good and sufficient bond, with two or more sureties, or with a surety company as surety, in the penal sum of seven thousand five hundred ($7,500.00) dollars, conditioned that the party of the second part shall pay all claims for damages growing out of the doing of said work, or because thereof, all laborers, mechanics and subcontractors and material men, and all persons who shall supply such person or persons, or subcontractors with the provisions and supplies for carrying out said work.

"(9) Should the wells be sunk by the party of the second part under this contract, fail, when properly pumped to furnish a supply of at least eight hundred thousand (800,000) gallons of water per day of twenty-four (24) hours, of the quality hereinbefore mentioned, within ninety (90) days from the date of this contract, said ninety (90) days to be computed as hereinbefore mentioned, the party of the second part is to receive no compensation, and should the wells fail to produce the remaining seven hundred thousand (700,000) gallons when properly pumped, according to the same conditions, the party of the second part is to receive no compensation for said seven hundred thousand (700,000) gallons and forfeit the twenty-five per cent (25 per cent) of payment due for said eight hundred thousand gallons (800,000)."

The court below found the issues in favor of the plaintiff, and gave judgment for the full contract price for sinking a well with a daily capacity of 1,500,000 gallons, less certain offsets not deemed material here. From this judgment the defendant has appealed.

The case turns largely upon the construction of the above contract, and the effect to be given a certain test made by

the appellant or under its supervision. It is admitted that the respondent sank a well with a daily capacity of 800,000 gallons, and that he has been paid the full contract price therefor. The respondent contends that the well had the further capacity of 1,500,000 gallons per day, but this claim is denied by the appellant. The well was completed to its present capacity some time prior to the 25th day of May, 1906, and on that day the city council of the appellant city adopted the following resolution:

"In regard to the testing of the well, it was moved and carried that two special police be appointed by the mayor to remain at the well alternating for a period of six days and nights to see that the pump runs at the same speed at all times, day and night, and that the water be measured each hour of the 24 and a record kept, the test beginning this, Friday, morning, and continuing until Wednesday night of next week. The mayor appointed Matt Locke and Michael Nelson as such special police."

The test provided for commenced on the date specified in the resolution, but after a run of about four days the engine broke down and the test was abandoned until a larger engine could be installed. After the old engine was replaced by the new or different one, the six days' test was resumed and completed, under the supervision of two special officers appointed by the mayor. The officers thus appointed reported the result of the test to the city council of the appellant city, and under date of June 26, 1906, the following entry appears in the minutes of that body: "Report of Matt Locke and Antone Anderson on the test of the new city well showing an average for the six days' test of one minute and 25 5-6 seconds for filling the tank holding ———. Ordered placed on file."

It was admitted at the trial that the tank referred to in the foregoing report had a capacity of 1,472 gallons, and the report shows, therefore, that the daily capacity of the well exceeded the 1,500,000 gallons called for by the contract. The appellant earnestly insists that it contracted for a water

supply of 1,500,000 gallons per day for a period of fourteen months, and that the proof shows that no such supply was furnished for that period. We agree with counsel that the city contracted for the supply agreed upon for the period of fourteen months, and also that the proof fails to show that such supply was in fact furnished for that period. This would preclude a recovery on the part of the respondent, unless the contract itself provides how the capacity of the well shall be ascertained, and such capacity was ascertained in the manner thus provided.

We are constrained to hold that the contract does contain such a provision. A portion of paragraph 5 reads as follows:

"The party of the second part is to proceed with said work, however, in an endeavor to increase said supply to at least one million, five hundred thousand (1,500,000) gallons of water per day of twenty-four (24) hours, *and when he shall be successful in obtaining a supply of water of such quality equal to one million five hundred thousand (1,500,000) gallons per day of twenty-four (24) hours, then the balance of the contract price, to wit: the balance of the amount due for said eight hundred thousand (800,000) gallons, and the amount due for the remaining seven hundred thousand (700,000) gallons for the period of fourteen (14) months, at the rate of two (2c) per one hundred cubic feet, shall be paid to the party of the second part, or to his order when tests are made and work accepted by the City Council.*"

This provision shows clearly that the capacity of the well for the entire period covered by the contract was to be ascertained by test, and that the contractor was to be paid in full for his work long before the expiration of the fourteen months. In other words, it was agreed between the parties that the capacity of the well for all the purposes of the contract should be ascertained by test as soon as the respondent was successful in obtaining a supply of water equal to 1,500,000 gallons per day of 24 hours, and that he should be entitled to the balance due under the contract at that time.

We are aware that under this construction of the contract the appellant took chances on the supply holding out for the full period of 14 months, but in our opinion no other construction will give full effect to all the provisions of the contract, which are somewhat conflicting. It follows from what we have said that the test made by the appellant established the capacity of the well within the meaning of the contract, and that test entitled the respondent to the full compensation provided for in the contract. Such having been the conclusion of the court below its judgment is affirmed.

DUNBAR, ROOT, MOUNT, and FULLERTON, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

[No. 7410. Decided December 2, 1908.]

S. WADE HAMPTON, *Respondent*, v. JAMES BUCHANAN *et al.*, *Appellants*.[1]

CORPORATIONS—STOCK—SUBSCRIPTIONS—CONTRACT FOR PURCHASE—DEFINITENESS—SPECIFIC PERFORMANCE. A contract whereby a purchaser of corporate stock was to have the "option to come into the mill and take part in its management on the same terms" as provided for certain other stockholders, is too indefinite to warrant a specific performance conferring upon him the right to any particular office in the corporation, or to draw the same salary that the other officers were to be paid.

SAME—STOCKHOLDERS—CONTRACTS AS TO OFFICERS — LEGALITY—SPECIFIC PERFORMANCE. A promoters' contract between stockholders of a corporation placing upon the trustees the duty to elect certain officers at similar salaries is illegal and will not be specifically enforced.

WORK AND LABOR—CONTRACT FOR EMPLOYMENT—BREACH—MITIGATION OF DAMAGES. Recovery of the whole salary for a wrongful discharge from employment cannot be sustained where the plaintiff had obtained other employment at the same salary.

CORPORATIONS—ACTIONS AGAINST—SALARY OF OFFICERS. In an action brought against a corporation and its officers for a salary and a wrongful discharge from employment, resulting from collusion,

[1]Reported in 98 Pac. 374.

any judgment for the plaintiff should be against the corporation, and cannot be made a lien against the property of a colluding officer who was joined as defendant in the suit.

CORPORATIONS—STOCKHOLDERS—FRAUD UPON MINORITY STOCKHOLDERS—RECEIVERS. Equity will grant relief to a minority stockholder in a corporation by the appointment of a receiver where there was collusion between the officers to unfairly deal with the plaintiff by dismissing him from office and absorbing the profits of the business in large increased salaries to themselves.

FULLERTON, J. dissenting.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 7, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for specific performance. Reversed.

Frank D. Oakley (*Chas. Bedford*, of counsel), for appellants.

Blattner & Chester, *J. M. Ashton*, and *L. B. da Ponte*, for respondent.

DUNBAR. J.—The respondent, having been removed from the office of secretary of the defendant corporation, Puget Sound Lumber Company, and basing his right to hold an office in said defendant corporation and to participate in the management thereof upon a certain contract, entered into by the company and himself at the time he became a stockholder therein, brought this action to compel defendants to restore him to office in said corporation and to have said contract specifically enforced. From the judgment and decree entered by the court in favor of respondent, appellants appeal.

The complaint is exceedingly lengthy, but the essential averments are, that the defendant Puget Sound Lumber Company is a corporation, legally organized, etc., whose principal object was the carrying on of a sawmill business and the manufacture of lumber; that the defendants Buchanan and McDaniels were its organizers, and constituted its first board

of trustees; that the defendants Buchanan and McDaniels importuned plaintiff to become a purchaser of the stock of the defendant corporation; that after several consultations and conferences between the parties, an agreement in writing was made, in words and figures as follows:

"Tacoma, Wash., August 7th, 1901.

"Mr. S. Wade Hampton, Seattle, Wash.:

"Dear Sir—The Puget Sound Lumber Co. of Tacoma has been incorporated with a capital stock of ($5,000) five thousand dollars, of which it is proposed to pay in at once three thousand dollars, leaving the unpaid balance of two thousand dollars to be paid in out of the earnings, in liquidation of deferred payments on machinery and equipment. We make you this proposition, viz.; We will increase our present holding of the stock of said company until we each have ten shares of one hundred dollars each, amounting to an investment of one thousand dollars each. We will devote our time and energy to the best of our ability to the careful and economical management and operation of said mill plant, receiving for our services the sum of one hundred dollars per month each, with the understanding that we shall draw only one-half of this amount each month, leaving the other half standing to our credit on the books of the company, until the deferred payments on machinery and equipment shall have been paid off (provided this contract shall not have been previously terminated in some other way), when we shall receive the unpaid balance of said salary. You for your part to take and pay for an amount of said stock equal to the amount held by each of us, viz: ten one hundred dollar shares, amounting to one thousand dollars, on the acceptance of this proposition when the deferred payments shall have been paid out, stock to the amount of said deferred payments not exceeding the unpaid balance of said capital stock, shall be issued in equal amounts to each of the parties to this agreement without any further payment on their part. It is understood that when the indebtedness as above specified has been paid out, you shall have the option to come into the mill and take part in its management on the same terms as ourselves.

"Puget Sound Lumber Co.
"C. McDaniels, Sec-Treas.
"James Buchanan, Pres.

"I accept the above proposition. S. Wade Hampton;"

that pursuant to such agreement, the plaintiff purchased ten shares of the stock of defendant corporation, and paid therefor the sum of $1,000; that when the conditions of said agreement were fulfilled the plaintiff, who was then a resident of Seattle, moved to Tacoma and commenced an active participation in the management of the corporation, being elected president thereof; that the defendant Buchanan was its vice president and manager, and the defendant McDaniels was its secretary treasurer; that it was then agreed that each of the said parties should draw a salary under the agreement in writing above mentioned of the sum of $125 each per month; that there should be allowed to Buchanan in consideration of extra time and services the further sum of $25 per month; that McDaniels, by reason of ill health, was unable to devote his time and energies to the business, and that additional burdens thereby fell upon plaintiff, and he demanded a raise in his salary equal to that of the defendant Buchanan, which demand was refused; that afterwards, on or about the 1st of November, 1905, the defendant Buchanan purchased all of the interests of the defendant McDaniels in the corporation; that Buchanan was without means to pay the notes given for said stock, and that McDaniels and Buchanan schemed and conspired together to deprive the plaintiff of his actual participation in the management of the affairs of the defendant corporation, in order that the earnings of the corporation might be diverted to secure the payment of said notes as they matured, and for the further purpose of depriving the plaintiff of his salary; that the business of the defendant corporation has been prosperous and profitable; that shortly after the purchase of the said stock by Buchanan, a special meeting of the trustees of the defendant corporation was held and a pretended election was held by which the defendant Wintermote, who had succeeded to the stock formerly owned by McDaniels, was chosen a trustee to fill the vacancy by the resignation of the defendant McDaniels; that at the time of the said election defendant Wintermote was not a stockholder,

and never took the oath of office prescribed by law for trustees of corporations under the laws of the state of Washington; that on the 14th day of November, 1905, another meeting of the trustees was held, at which meeting, by vote of the defendants Buchanan and Wintermote, the minutes of the trustees meeting November 6, 1905, were changed and altered so that it appeared that the resignation of the defendant McDaniels as vice president and treasurer, as well as trustee also, was accepted, when it had been agreed and understood that no action was to be taken upon the said defendant's resignation as vice president and treasurer, but that the same was to remain in abeyance until the annual meeting of the defendant corporation; that at said meeting by-laws were adopted for the defendant corporation, which had been prepared by the defendant Buchanan; that by these by-laws power to elect the officers and appoint the agents and servants of the defendant corporation was placed in the board of trustees; that the number of officers was cut to two and the power to control all the business of the defendant corporation was placed in the president; that on the 22d day of November, 1905, the defendants Buchanan and Wintermote pretended to hold a meeting of the trustees of the defendant corporation, at which meeting they removed the plaintiff from the office of secretary and proceeded to elect officers of said corporation; that thereafter the plaintiff demanded of the said defendants Buchanan and Wintermote that he be permitted to continue in the service of said corporation as its secretary, and to continue to participate in the management of its business under the agreement hereinbefore set forth; that such petition was refused.

The complaint further alleges, in substance, that after the affairs of the corporation were placed in the hands of the defendants, they proceeded to raise their salaries and to overdraw their accounts with the defendant corporation and incur unwarranted indebtedness upon the defendant corporation, for the purpose and as a part of the fraudulent scheme

and conspiracy to cause the affairs of the corporation to become or appear to be involved, for the purpose of reducing and minimizing the apparent value of the plaintiff's stock in the said corporation and to deprive the plaintiff of the benefit of the agreement in writing hereinbefore set forth; and very much more to the same effect.

The plaintiff avers that there is imminent danger of defendant Buchanan, either by himself or in connection with the defendant Wintermote, selling, mortgaging, leasing, or otherwise incumbering said real and personal property in the furtherance of said fraudulent scheme, and asks that a preliminary restraining order may issue to the defendants Buchanan, McDaniels and Wintermote, to restrain them from transferring, selling, incumbering or in any way disposing of the stock of the defendant corporation pending a hearing of plaintiff's prayer; praying that a reciever of the defendant corporation may be appointed, and for damages to plaintiff from the defendants and each and all of them, in the sum of $2,000, and for a permanent injunction to restrain and enjoin the defendants from in any manner whatsoever refusing to permit the plaintiff to participate in the management of the defendant corporation at a salary equal to the highest amount paid as salary or otherwise, except as dividends, to the defendants Buchanan, McDaniels, or Wintermote, or either of them, and for general relief.

The answer denied the material allegations of the complaint—a demurrer having first been interposed to the effect that the court had no jurisdiction of the persons of the defendants or the subject-matter of the action, that the plaintiff had no legal capacity to sue, that there was a defect of parties plaintiff, that there was a defect of parties defendant, that several causes of action had been improperly united, that there was another action pending between the same parties to the same case, and that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled.

The judgment of the court was, that the plaintiff be declared to be the owner of and rightfully entitled to an interest in the property, rights and assets of the Puget Sound Lumber Company, to the extent and value of $5,487.08; that the claim of the said plaintiff for the said sum be and the same is declared a first lien and charge upon all the right, title and interest of the defendant James Buchanan in the property of the Puget Sound Lumber Company, defendant herein, and upon the stock of the said company as said defendant Buchanan's interest may appear to have been at the time of the execution and delivery of the certain agreement, aforementioned, for the purchase of the stock, right, title, and interest of the said Puget Sound Lumber Company at that time owned and held by Clinton McDaniels, one of the defendants named in this cause. The defendants were also enjoined and restrained from interfering with or refusing to permit the plaintiff to participate in the management and control of the business carried on by the defendants, on the same rate of remuneration enjoyed by the said defendants McDaniels, Buchanan and Wintermote, or either of them. Judgment, also, for costs.

The contract upon which the judgment is rendered in this case is too indefinite to form the basis of an action. The language, "You shall have the option to come into the mill and take part in its management on the same terms as ourselves," certainly does not guarantee the right to any particular office or to any office for any particular length of time. Nor does it necessarily imply that the respondent shall have the same salary as the other contracting parties. The management of one branch of the business might require a character of service which was worth more than some other character of service. The construction placed upon the language by appellant Buchanan was that they were each to receive remuneration in proportion to the value of the services rendered, and this is not an unreasonable construction. That the respondent him-

self did not expressly rely on this agreement, and did not understand what it meant or what his rights under it were, is evident from the fact that, in response to a motion to make his complaint more definite and certain and to state specifically what office he was entitled to hold in the corporation and for what length of time, he answered as follows:

"Now comes the plaintiff in the above entitled cause, and complying with the order of this court heretofore made to state specifically what office plaintiff claims in the defendant corporation and for what length of time said office is claimed, states that the plaintiff does not lay claim of title to any specific office in the said corporation for any length of time whatsoever against the said corporation; but bases his right to equitable relief at the hands of this court upon the contracts and agreements between the plaintiff and the defendants or some of them, as set forth in the pleadings in this case."

It is evident from the memorandum opinion of the court filed in that case that the judgment was rendered upon this agreement, and that it held that the agreement was not unlawful, because, while it assumed to be an agreement with a corporation, it was in reality a partnership agreement. But whether it was originally a partnership or a corporation agreement, is not material, for the concern afterwards undoubtedly became a regular corporation; and after it did so become a corporation, it had to be governed by the laws governing corporations, and appellants' business had to be done through its trustees. There is no authority which would permit a corporation to enter into a contract which would place the trustees under obligations to disregard the duty they owed to the stockholders, viz., to promote the business interests of the corporation; and this they certainly could not do if they were so fettered by contract that they could not dismiss an employee and act freely and purely for the business interests of the stockholders when emergencies arose. The granting of such powers as are relied upon by the respondent through this agreement would virtually deprive the stockholders of the right to elect their trustees. Therefore, equity

will not assume jurisdiction to compel the specific performance of an illegal contract. That such a contract is illegal all authority asserts; but see especially, *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254, and *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 51 L. R. A. 404. The policy of the law is not changed by the fact that the stockholders are many or few.

There seems to us to be nothing upon which to base the judgment for $5,487.08; for, in any event and under all authority, if respondent was damaged by wrongful dismissal from his employment, it was his duty to lessen his damage as much as possible by obtaining other employment, which he testifies that he almost immediately did, at the same salary. Neither could the judgment, if correct, be made a lien upon the property of Buchanan, for if respondent is entitled to a judgment at all, it should be a judgment against the corporation and not against an individual. This action shows in all of its features that it is an action against a corporation, and as such it should have been tried and decided; and while, for the reasons assigned, the judgment obtained cannot be sustained, the allegations of the complaint are sufficient to warrant the granting of some relief to respondent as a minority stockholder. *Theis v. Spokane Falls Gas Light Co.*, 34 Wash. 23, 74 Pac. 1004. We think such allegations are justified by the testimony, and that there was a collusion between Buchanan and Wintermote to unfairly deal with the respondent for the purpose of preventing him from receiving his just share of the profits of the business, by dismissing him from office and by absorbing the profits of the business in large and increased salaries appropriated to themselves, and to the exclusion of his rights as a minority stockholder.

We will, therefore, reverse the judgment; and, in consideration of the fact that there are no stockholders other than the parties to this contention to be affected, remand the case with instructions to the lower court that, in case a stipulation of settlement is not made, or if appellants shall not offer an

adjustment that appears fair and reasonable to the court, within thirty days from the filing of this opinion, that portion of appellant's prayer asking for the appointment of a receiver be granted, and that a receiver be appointed to settle up the affairs of the corporation.

HADLEY, C. J., MOUNT, and RUDKIN, JJ., concur.

FULLERTON, J. (dissenting)—I dissent from the disposition made of this case. The case should be sent back for further evidence as to the amount due the respondent, leaving that question to be determined by the court.

[No. 7485. Decided December 8, 1908.]

EDWARD B. JUDSON *et al.*, *Respondents*, v. TIDE WATER LUMBER COMPANY, *Appellant*.[1]

APPEAL—REVIEW—FINDINGS. In an action at law tried by the court without a jury, findings upon conflicting evidence will not be disturbed on appeal where the trial court heard the witnesses and viewed the premises and there appears no preponderance of the evidence against the findings.

NAVIGABLE WATERS—RIPARIAN RIGHTS—OBSTRUCTIONS. Riparian owners on a navigable tidal river have the right to have the waters flow by their lands in a natural way, and to prevent obstructions or diversion thereof whereby their banks are being washed away; and in such case equity has power to order the removal of the obstructions, in addition to awarding damages.

SAME—DEFENSES—RIPARIAN RIGHTS—OWNERS OF TIDE LANDS. The ownership of tide lands by a riparian owner along the bank of a navigable river does not give any right to place obstructions in the river diverting the flow of the waters to the damage of other riparian owners.

SAME—NAVIGABILITY. Where a channel in a navigable river between the shore and a sand bar is navigable by row boat at half tide, and at full tide carries six feet of water, the same is navigable in fact.

[1]Reported in 98 Pac. 377.

SAME—DAMAGES FOR OBSTRUCTING RIVER—EXCESSIVENESS. A judgment for $11,250 damages for the obstruction of a navigable river, whereby the water was diverted and two and a quarter acres of the plaintiffs' land washed away, is not excessive, where there was evidence that the land was worth $5,000 per acre.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 27, 1908, upon findings in favor of the plaintiffs for damages, after a trial before the court without a jury, in an action for the obstruction and diversion of a river. Affirmed.

G. C. Israel and *W. P. Reynolds*, for appellant, contended, among other things, that the area in dispute was part of the tide lands abutting on appellant's property and not part of the channel or bed of the Puyallup river. Const. art. 17, § 1; Pierce's Code, §§ 8204, 8244, 8247. Had these accretions and deposits occurred in a non-tidal river, under the common law right of riparian owners to take to the "thread of the stream," the land formed by accretions would have become the property of the defendant to the loss of the plaintiff of the lands the river had taken to compensate itself. 3 Farnum, Waters, p. 2495; *Quinlin v. Bratley* (Iowa), 80 N. W. 405; *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550; *Buse v. Russell*, 86 Mo. 209; *Cox v. Arnold*, 129 Mo. 337, 31 S. W. 592, 50 Am. St. 450.

Ellis, Fletcher & Evans and *Herbert S. Griggs*, for respondents.

HADLEY, C. J.—This is an action for damages occasioned by the alleged wrongful obstruction of a portion of the channel of the Puyallup river. The removal of the obstructions is also sought to be effected by the action, in order that the original flow of the river may be re-established.

The defendant Tide Water Lumber Company is the owner of a lumber mill, on the westerly or left side of the Puyallup river, not far above the mouth of the stream where it flows

into Puget Sound. On the easterly or right side of the river, and a short distance down the stream below that part of the shore immediately opposite the defendant's mill, lies a tract of land which belongs to the plaintiffs. The complaint alleges, that this land lies on the east bank of the stream and has a frontage, as originally surveyed and meandered by the United States, of about four hundred and sixty feet on the river, and that the premises contain six and 22-100 acres, according to the original surveys and meanders; that the Tide Water Lumber Company, in connection with the operation of its lumber manufacturing plant upon the opposite side of the river, some time in the year 1902, commenced to obstruct the channel of the river in front of the mill premises, by extending permanent obstructions beyond the left bank of the river into the channel thereof; that it has continued to enlarge the obstructions gradually from time to time, and is now engaged in so doing, the same consisting of a double row of piling extending out into the river channel beyond the west or left bank for a distance of about two hundred and fifty feet, and thence northwesterly along the line of the channel and parallel to the west bank a distance of about four hundred feet, having a connection back to the west bank by similar construction a distance of about two hundred and fifty feet; that the piling are driven deeply and solidly into the river bottom, and are braced and faced with rough planking and supports so as to form a permanent bulkhead; that by the obstructions the defendant has inclosed about two and one-half acres which, prior to the obstructions, formed a part of the original channel of the river; that the defendant has dredged out a portion of the bottom of the channel so inclosed, and has deposited the matter so dredged out on the outside of the bulkhead so as to permanently obstruct and appropriate to its exclusive use the original channel, for a distance of about two hundred and fifty feet in width and four hundred feet in length along the course of the channel; that but for the obstructions, so placed by the defendant, the

river would naturally have flowed along in the lines of the original channel, and would not have encroached upon the plaintiffs' property beyond the original government meander thereof; that the obstructions diverted the course of the river from the natural channel and forced the current and flow of the waters upon plaintiffs' land, so that a large part thereof has been washed out.

The answer denies many of the averments of the complaint, and affirmatively alleges that the washing away of the plaintiffs' land has been due to the action of high water in the river in times of flood, and not to any diversion of the channel by the defendant. The cause was tried by the court without a jury, and resulted in a judgment for the plaintiffs in the sum of $11,250, as damages; also, in a decree declaring that the original and natural east bank of the river in front of the plaintiffs' property corresponded in general with the meander line of the government survey, and that the original and natural west bank of the river in front of the defendant's property corresponded in general with the delineation thereof as shown on the plat of Indian Addition to the city of Tacoma, which plat is of record in the auditor's office of Pierce county, Washington. The decree also requires the Tide Water Lumber Company to forthwith remove from the river all piling, bulkheading, dirt, logs, debris, and obstructions of every kind and description, placed by it in the river extending beyond the natural bank thereof, as above defined; that the work of removal should be commenced before the 17th day of February, 1908, and thereafter diligently prosecuted and finished by the 17th day of May, 1908. It also provided that, in the event the work of removal is not commenced within the time specified and thereafter diligently prosecuted, then the plaintiffs may remove the obstructions at the expense of said company, and further judgment for the expense of such removal may hereafter be entered upon motion of the plaintiffs, with proper proofs of same, the cause being continued until the obstructions are removed or until the further

order of the court. The defendant Tide Water Lumber Company has appealed.

The findings of the court are in substantial accord with the averments of the complaint. It was found that, from time immemorial until appellant commenced to build in the river, there was a sand bar or island in the river in front of the lands of appellant, extending in length about two hundred feet and in width from fifty to seventy-five feet; that the river channel between the sand bar and the natural bank or line of appellant's property is from fifty to one hundred feet in width; that this channel at extreme low tide contained but little water, but at half tide a rowboat could be rowed through it, and at high tide the river ran entirely over the sand bar and extended from bank to bank some three hundred and fifty feet in width. It was found that appellant had driven the piling and bulkheading and had placed the obstructions as alleged, had excavated a log pond below, and had thrown the dirt and debris upon the sand bar, thereby raising it along its entire length, so that the river, even in flood period, does not submerge it; that these acts of appellant cut off about one-third of the former flow of the river, and that the river then commenced to compensate itself by washing the opposite or right bank; that the bank constituting the river front of respondents' premises had washed away to a small extent prior to the time the respondents acquired title, and the bank and lands since then have washed away at least to the extent of two and one-fourth acres additional, which amount has been severed from respondents' land and swept down the river; that at the time of the trial the bank had been washed back one hundred feet or more along respondents' entire frontage. The value of the land washed away was found to be $5,000 per acre, and judgment was given accordingly.

The findings of the court are vigorously attacked by appellant. There was much testimony introduced at the trial, and there was also conflict therein, but there was undoubtedly

substantial testimony in support of the findings of the court. We are unable to discover in the conflict of testimony any preponderance against the findings. The trial court had the opportunity of observing all the witnesses, and he moreover actually went upon the ground and saw the situation. With these opportunities, that court could weigh the testimony far better than we can, from the mere record of the oral testimony and from the observation of the maps and pictures sent up with the record. We shall, therefore, not disturb the findings.

The conclusions of law naturally follow. This is a navigable, tidal river. One-third of its waters and of the force of its current swept between the sand island and the front of appellant's property. At low tide there was not much water in this part of the channel, but at half tide it could be navigated with a rowboat, and at full tide the waters rose above the entire island so that a boat could then pass over it. At ordinary high tide the water in the channel reached a depth of as much as six feet. Respondents' as riparian proprietors on this river, have the right to prevent the obstruction of the flow or the diversion of its waters, and to have the same continue to flow in a natural way by their lands. This is a right inseparably annexed to the soil itself. *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28; *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107.

Appellant argues that the land in front of its premises is tide land, the title to which it has taken steps to acquire from the state; but it was held in *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 809, that any sale of tide lands by the state must be subject to the paramount right of the public in the navigable waters thereof, and confers no right to obstruct navigation therein. The evidence shows that the channel in front of appellant's property is a navigable one in fact, although it may not be navigable at low tide, which

establishes its navigability in law within the decision of *Dawson v. McMillan, supra.* The doctrine of the latter case was also approved in *Monroe Mill Co. v. Menzel,* 35 Wash. 487, 77 Pac. 813, 102 Am. St. 905, 70 L. R. A. 272, which involved a fresh water stream, not at all times navigable in fact, but which was periodically navigable. Appellant is therefore not only unlawfully obstructing a navigable channel, but as a result of so doing it has caused the waters to be diverted and thrown upon respondents' land, to their serious damage. It seems elementary, therefore, that appellant should respond in damages; and in view of all the testimony upon that subject, we think this court should not say that the amount of damages awarded is excessive. It also follows that appellant, as a wrongdoer obstructing a navigable channel and thereby continuing to injure respondents' land, should remove the obstructions, restore the river to its former channel, and thereby cause the damage to cease. To that end it was proper for the court, acting as a court of equity, to order the appellant to remove the obstructions.

The judgment in all essential particulars is affirmed, but it will be necessary to modify it in respect to the time for the removal of the obstructions. The judgment allowed twenty-one days from its date for the commencement of the work of removal, and required that it be thereafter diligently prosecuted and finished within three months from the commencement of the work. By reason of the appeal, that time has long since passed. The cause is remanded with instructions to enter a supplemental order as a modification of the original judgment, to the effect only that the same length of time shall be allowed for the commencement and completion of the work respectively, after the date of such order, as was formerly allowed with reference to the date of the original judgment. The modification shall not affect respondents' recovery of their costs on appeal.

RUDKIN, DUNBAR, MOUNT, and CROW, JJ., concur.

FULLERTON, J., took no part.

[No. 7484. Decided December 8, 1908.]

THE AMI COMPANY, *Respondent*, v. TIDE WATER LUMBER COMPANY, *Appellant*.[1]

NAVIGABLE WATERS—RIPARIAN RIGHTS—OBSTRUCTIONS—DAMAGES—EXCESSIVENESS. A judgment for $950 damages for the obstruction of a navigable river, whereby the water was diverted, resulting in the washing away of nineteen one-hundredths of an acre of land, of the value of $5,000 per acre, will not be held excessive from the fact that surveys of the land showed an accretion instead of a loss to the tract, where it appears that the accretion was due to the owner's efforts in protecting the head of the land, and to the construction of a bridge upstream, while loss was occasioned downstream at the foot of the land by defendant's obstruction.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 27, 1908, upon findings in favor of the plaintiffs for damages, after a trial before the court without a jury, in an action for the obstruction and diversion of a river. Affirmed.

G. C. Israel and *W. P. Reynolds*, for appellant.

Herbert S. Griggs and *Ellis, Fletcher & Evans*, for respondent.

HADLEY, C. J.—With the exception of the amount of damages, the questions involved in this case are the same as those involved in cause No. 7485, *Judson v. Tide Water Lumber Co.*, *ante* p. 164, 98 Pac. 377, just decided by this court. The lands of the respondent in this action lie fronting the Puyallup river upon the easterly or right bank thereof, and are immediately above the Judson lands involved in the case mentioned. They also lie directly opposite the land of the Tide Water Lumber Company, located as described in the former case. The Ami Company, the respondent in this action, charges damages to its land from the same acts of the Tide Water

[1]Reported in 98 Pac. 380.

Lumber Company which it is claimed damaged the Judson land. The court, after a trial, made findings essentially like those in the *Judson* case, and awarded damages in the sum of $950, together with a similar decree defining the channel of the river and requiring the removal of the obstructions.

The appellant claims on this appeal that no actual loss to respondent's land was shown, but that it appeared that there was really a net gain, and therefore no damages should have been awarded. Mr. Nicholson, a civil engineer, testified that, on September 8, 1903, which was after the obstructions were placed in the river, the loss to the tract now owned by respondent was three and seventy-five one-hundredths acres. That was, however, before the respondent became the owner of the tract, which occurred in 1904. He also testified that, in December, 1905, the loss was three and eighty-one one-hundredths acres. This was the first survey shown by his testimony after respondent became the owner, and showed an increase in the loss since the former survey of six one-hundredths of an acre. The next survey was in April, 1906, and showed a total loss of three and ninety-four one-hundredths acres, being an increase in loss since the last survey of thirteen one-hundredths of an acre. Up to this point, it will be observed that the amount of loss after respondent became owner must have been about nineteen one-hundredths of an acre, as nearly as the witness could place it. Subsequent surveys, however, showed some gain, and in November, 1907, just prior to the trial, the total loss to the whole tract was shown to be three and five one-hundredths acres, which was a gain of eighty-nine one-hundredths of an acre since the survey in April, 1906. It is therefore argued that there was no loss after respondent became the owner, for which appellant is liable.

From the above figures it, at first glance, seems paradoxical that there was a judgment rendered for damages. The court's theory is, however, logical, and it has the support of competent testimony in the record. That theory is as follows: In March, 1906, the respondent drove piles at the upper end of

its tract, and these with the help of the Dempsey bridge, which was built about the same time, protected the bank, and it therefore showed a slight fill or increase at that point. The aggregate increase to the tract shown by the later surveys is accounted for in this manner. The nineteen one-hundredths of an acre was, however, cut away from the land further down the stream, and that has not been restored. Under the theory of respondent, which was adopted by the court, the later accretion, resulting in a gain at the upper end of the tract, was entirely due to the efforts of respondent itself and to the protection of the bridge, and was not brought about by any act of the appellant; whereas the loss below was directly due to the wrongful maintenance of the obstructions by appellant, and that loss has not been restored. It was upon this theory that the court awarded damages for that loss.

It must be manifest to any one that the extent of actual damage under such circumstances is very difficult to ascertain, and it is impossible to do it with mathematical accuracy. The trial court having heard all the evidence upon the subject and having viewed the situation itself, we shall not undertake to say that the evidence which it found to be correct was not in fact entitled to be so received. The court found the value of the land to be $5,000 per acre, and the nineteen one-hundredths of an acre was therefore valued at $950. In view of all the evidence, we shall not say that the amount is excessive.

The judgment in all essential particulars is affirmed, but it will be necessary to modify it in respect to the time for the removal of the obstructions. The judgment allowed twenty-one days from its date for the commencement of the work of removal, and required that it be thereafter diligently prosecuted and finished within three months from the commencement of the work. By reason of the appeal that time has long since passed. The cause is remanded with instructions to enter a supplemental order as a modification of the original judgment, to the effect only that the same length of time shall be allowed for the commencement and completion of the

work, respectively, after the date of such order, as was formerly allowed with reference to the date of the original judgment. The modification shall not affect respondent's recovery of its costs on appeal.

RUDKIN, DUNBAR, MOUNT, and CROW, JJ., concur.

FULLERTON, J., took no part.

[No. 7478. Decided December 8, 1908.]

ELIZABETH HASE, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—ACTIONS—CLAIMS—AS CONDITION PRECEDENT—REASONABLENESS OF REQUIREMENTS—STATEMENT OF CLAIMANT'S RESIDENCE. It is an unreasonable requirement that a claimant for damages against a city shall state his residence for one year last past in a claim to be filed with the city, as a condition precedent to action against the city, and hence one that the city has no power to enforce by ordinance (MOUNT and FULLERTON, JJ., dissenting).

SAME—CLAIM—DESCRIPTION OF DEFECT—SUFFICIENCY. A claim for damages against a city for personal injuries sufficiently describes the nature of the defect when it alleges that the injury was caused by the claimant's "falling through a defective sidewalk," under the rule requiring claims to be as liberally construed as a pleading.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 18, 1908, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for personal injuries sustained by reason of a defective sidewalk. Reversed.

Shorett & Shorett, for appellant.

Scott Calhoun and *James E. Bradford*, for respondent, contended that this court has no right or power to nullify legal charter provisions under the guise of liberal construction, as long as the same are constitutional. 26 Am. & Eng. Ency. Law (2d ed.), p. 569, 597-600; 17 Am. & Eng. Ency.

[1]Reported in 98 Pac. 370.

Law (2d ed.), pp. 2-4; *Scurry v. Seattle*, 8 Wash. 278, 36 Pac. 145; *Mears v. Spokane*, 22 Wash. 323, 60 Pac. 1127; *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386; *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025; *Johnson v. Troy*, 48 N. Y. Supp. 998; *Board of Trade v. Hayden*, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 31 Am. St. 919, 16 L. R. A. 530; *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *Point Roberts Fishing Co. v. George & Barker Co.*, 28 Wash. 200, 68 Pac. 438; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. 893; *Spokane and Eastern Trust Co. v. Lavigne*, 14 Wash. 681, 45 Pac. 664; *Gardner v. New London*, 63 Conn. 267, 28 Atl. 42. The claim to the city failed to describe the defect that caused the injury. *Mears v. Spokane, supra; Van Loan v. Village of Lake Mills*, 88 Wis. 430, 60 N. W. 710; *Lord v. City of Saco*, 87 Maine 231, 32 Atl. 887; *Noonan v. Lawrence*, 130 Mass. 161; *Miles v. Lynn*, 130 Mass. 398; *Gardner v. New London, supra; Beisiegel v. Seymour*, 58 Conn. 43, 19 Atl. 372; *Lilly v. Woodstock*, 59 Conn. 219, 22 Atl. 40; *Dolan v. Milwaukee*, 89 Wis. 497, 61 N. W. 564; *Paddock v. Syracuse*, 15 N. Y. Supp. 387; *Madden v. Springfield*, 131 Mass. 441; *Dalton v. Salem*, 131 Mass. 551; *Shea v. Lowell*, 132 Mass. 187; *Cronin v. Boston*, 135 Mass. 110; *Lyon v. Cambridge*, 136 Mass. 419. The residence of claimant should have been stated in the claim. *State v. Smith*, 47 Ore. 485, 83 Pac. 865; *Johnson v. Troy*, 48 N. Y. Supp. 998; *Borst v. Sharon*, 48 N. Y. Supp. 996.

DUNBAR, J.—The appellant brought an action against the city of Seattle for damages resulting from personal injuries. A claim for damages for said injury was filed with the city clerk of said corporation, and later a suit brought thereon. At the trial the claim provided for by ordinance was offered in evidence, and objection was made to its introduction, which was sustained by the court. The court directed the jury to return a verdict in favor of the city, which was done. Judgment of dismissal was entered, and appeal followed. So that

the only question in the case is whether the claim presented by the appellant to the city council was sufficient.

The principal objection urged to the claim, and the one on which the court rejected it, is that the claimant did not state her residence for the past year, and this alleged defect was the cause alleged by the city for refusing the claim. It is also insisted that the notice was not sufficient in that it did not clearly set forth the defect in the sidewalk which was the alleged cause of the accident. The claim presented was as follows:

"To the city council of the city of Seattle:

"The undersigned Elizabeth Hase hereby presents to the said city council her claim for damages against the city of Seattle, a municipal corporation of the state of Washington, in the sum of $10,000, which said claim is hereby filed with the clerk of said city of Seattle; that said claim for damages is on account of personal injuries sustained by the said Elizabeth Hase in the said city of Seattle on the 23d day of March, 1907, at 9:30 p. m.; that said injuries consist of pain from a broken left forearm (a fracture known as 'Calles fracture'); also suffers much pain from being bruised through the chest between the shoulder blades and across the small of the back, and since the accident she has suffered nervous chills; that the said injuries were sustained by the said Elizabeth Hase on said date in the city of Seattle on the west side of Sixth avenue between Blanchard street and Bell street; that the said injuries were caused by said Elizabeth Hase falling through a defective sidewalk."

The ordinance demanding the presentation of the notice was as follows:

"All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such claims for damages must ac-

curately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of the claimant, contain the items of damages claimed, and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until after the same has been presented to the city council and sixty days have elapsed after such presentation."

Counsel for respondent vigorously inveigh against the application of the rule of liberal construction, insisting that the city is authorized under the laws and constitution to make such provisions as it deems necessary for its protection, and that it is not the province of the court to destroy such provisions by construction. So far as the first proposition is concerned, it is not a question of construction, liberal or otherwise, for the ordinance plainly provides that the claimant must state in his notice his residence for one year last past. This language is not susceptible of any two meanings, and therefore the only question to be considered is the right of the city to make such a demand of a claimant as a prerequisite to waging his claim for damages.

It is insisted that the uniform trend of authority is that such charter provisions are constitutional and wise, and some authorities are cited to sustain that contention, among them *Scurry v. Seattle*, 8 Wash. 278, 36 Pac. 145. An examination of this case, however, convinces us that it does not announce all that is claimed for it by learned counsel. All that that case held was that the provision of the freeholders' charter of Seattle declaring that no action shall be maintained against the city for any claim for damages unless such claim had been presented to the city council within six months after the time when such claim for damages had accrued was not unconstitutional and void as being in contravention of the statute of limitations with reference to the commencement of actions; but it was also held in that case that the only limitation of the right of the city to make a provision concerning the time in which a claim for damages should be presented would

be the limitation of a reasonable time, and that must necessarily always be a limitation to be taken into consideration, else cities would be conferred with power to destroy rights existing at the common law.

As showing that it never was the idea of this court that the power of cities is unlimited, it was held in *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847, that, although the freeholders' charter of a city may provide an ample method for the condemnation of private property for use as a public street, and legislative enactment may confer upon cities organized under freeholders' charters the authority to appropriate private property to corporate uses, such power was inoperative in the absence of an act of the legislature conferring the right of eminent domain and prescribing the method by which it should be exercised. And in *State ex rel. Snell v. Warner*, 4 Wash. 773, 31 Pac. 25, 17 L. R. A. 263, it was held that, under art. 11, § 10, of the constitution, authorizing a city of twenty thousand or more inhabitants to form a charter for its own government, and providing for amendments thereto, no authority is given such city to extend its boundaries by amendment to its charter; the court in this case saying:

"While the provisions of the constitution are to be given every liberal interpretation when the accomplishment of the purpose to be attained by them is at stake, we are bound to remember that they are somewhat unusual and extraordinary provisions, and that they are indirect restrictions on the power of the legislature, which can prescribe rules for the government of every municipal corporation but these."

It must be borne in mind that the powers claimed by the city in this case—and in fact in all cases of this character—are restrictions on common law rights. In *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077, it was held that the power conferred by the constitution and laws did not extend to the municipality power to impose a qualification of registration upon the electors. In *State ex rel. Fawcett v. Superior Court*, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674, it was held that

these constitutional provisions would not sustain charter provisions providing a tribunal for determining election contests. There we said:

"But we must not lose sight of the elementary proposition that municipal corporations have only the powers which are specially conferred upon them by the legislature, or such other powers as by necessary implication flow therefrom."

But this identical question has been decided by this court in *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383, where it was held that such charter provisions and restrictions could only be maintained where such conditions and restrictions were reasonable. This was a case for personal injuries alleged to have been sustained by reason of a defective sidewalk. So that the question there discussed was the identical question at issue in this case; and in aid of the construction of the requirement in the ordinance in that case, this court said:

"But it is not the rule that a city may say whether or not it shall be held for personal injuries caused by its neglect of duty. Charter provisions of the character in question, whether enacted by the legislature, or, as in the present case, by the city itself, are to be upheld only so far as they are reasonable and tend to the due administration of justice. When such provisions so far depart from reasonableness as to amount to a denial of justice they are void."

So that the question in this case is resolved into a question of the reasonableness of the ordinance requiring the claimant to give his residence for one year last past. It seems to us that this provision is unreasonable, and would in no way aid the city in the investigation of the claim. This court, in common with all other courts, has uniformly held that the object of these ordinances, and the theory upon which they were sustained, was notice so that the city might be able to prepare for the trial of the cause if it was deemed expedient not to settle the claim. From an excerpt from the opinion of the court, it seems that the court was influenced largely by the report of an Oregon case, where it was ascer-

tained that a professional fraud, who was permanently crippled, had been claiming in different actions that the cause of the injury to his leg was falling through sidewalks in different cities, and had secured judgments fraudulently in different cities in Oregon, that the fraud had finally been discovered, and the claimant sent to the penitentiary. But the fact that fraud in an exaggerated case may be perpetrated upon a city is no reason for the enactment of unreasonable restrictions. Fraud is perpetrated sometimes, not only upon municipal corporations, but upon other corporations and upon individuals, in claims and suits of different characters.

A provision requiring a claimant to give a present residence, as was the case in *Johnson v. Troy*, 48 N. Y. Supp. 998, cited and relied upon by counsel, might be held to be reasonable, for the reason that it would give the city authorities an opportunity to see the claimant and to talk with him, ascertain something of his appearance, or to make advances toward settlement of his claim if deemed expedient. But to require anything further than that seems to be unnecessary, and savors somewhat of inquisitiveness. If a requirement of this kind should be sustained, it is difficult to tell where the subject of biography would end. If the object is to inquire into the character or reputation of the claimant, then it might as well be said that the city has a right to demand, as a prerequisite to commencing an action, that the claimant should give the place of his birth, the different localities in which he had resided from that time up until the filing of the claim, his calling or profession, his parentage, associations, and a thousand and one other things that might be interesting to the city as a matter of idle curiosity. We have not been able to find any case exactly on this point, for it seems that it has never occurred to any other city to place any such provision in its charter. Believing that the provision is unreasonable and uncalled for, especially in consideration of the other requirement prohibiting the commencement of the action for sixty days from the date of the presentation of the claim,

thereby allowing ample time for all pertinent investigation, we think the court erred in rejecting the admission of the notice on that ground.

The other objection urged by counsel for the respondent is that the language used, viz., "that the said injuries were caused by said Elizabeth Hase falling through a defective sidewalk," the location of the sidewalk having been described, is not such a description of the defective sidewalk as is demanded by the ordinance in the provision that "all such claims for damages must accurately locate and describe the defect that caused the injury;" and *Mears v. Spokane*, 22 Wash. 323, 60 Pac. 1127, is relied upon to sustain this contention. In that case the language of the claim was as follows: "which injuries were caused by defects and obstruction in the sidewalk of the said city," describing the location; and this court said, in sustaining the objection to the claim, that:

"To state that the injury was caused by a defect and obstruction in the sidewalk is to but state the general ground upon which a city in every case is liable for injuries sustained upon its streets, but it states no cause for the particular injury. The charter provision is intended to require notice to be given of the cause of the particular injury, and a notice that fails so to do cannot be made the basis of an action against the city for personal injuries."

It seems to us that the case at bar does not fall within the reason of the rule announced in that case. There it could not be ascertained from the claim presented whether the defect was too narrow a sidewalk, or whether it was a temporary obstruction on the sidewalk, or whether it was something hanging down from above and obstructing the sidewalk. In fact, it gave no notice whatever of the character of the defect, and the officers of the city might not have been able to ascertain the character of the defect by a visit to the location. But claims of this kind must be viewed certainly with all the liberality of a pleading, and under the liberal provisions of our code there can be no question that there was enough in the

notice in the case at bar in this respect to put the city on notice that it was the sidewalk itself that was defective—that it was no pendent obstruction, that it was no obstruction of any kind on the top of the sidewalk. These things they would not naturally look for under the notice given in this case, for where the allegation is that the claimant fell through a defective sidewalk, any ordinary intelligent mind would immediately reach the conclusion that there was a hole in the sidewalk or some aperture through which the claimant fell. This case, instead of being governed by the *Mears* case, *supra*, falls more squarely within the rule announced in *Falldin v. Seattle*, 50 Wash. 561, 97 Pac. 658, where the language of the claim was: "Fell through said sidewalk owing to the defective condition, into a hole thereunder," and this language was held sufficient to give notice to the city of the defect complained of.

The rule of all the cases was summarized by this court in *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431, where it was said:

"This court has uniformly placed a liberal construction upon the requirements of such notice, holding that the notice had a common sense object, viz., to apprise the officers of the municipality of the location, so that it might be examined with a view to preparing a defense to the action if it was thought a defense should be made; that if it directs the attention of said officers with reasonable certainty to the place of the accident, the requirements of the notice have been met; and that it was not intended that the terms of the notice should be used as a stumbling block or pitfall to prevent recovery by meritorious claimants."

Surely this notice did direct the attention of the officers with reasonable certainty to the place of the accident, and when they were once there, the announcement made to them by the notice that the claimant fell through a defective sidewalk at that particular point was an announcement sufficiently plain to direct an intelligent investigation on the part of such officers. The evident spirit of this character of objections

is to prevent a hearing on the merits, and therefore cannot be sustained.

The judgment will be reversed, and the court instructed to overrule the objections to the introduction of the claim and proceed with the trial of the cause.

HADLEY, C. J., RUDKIN, and CROW, JJ., concur.

MOUNT, J. (dissenting)—I cannot agree that the provision of the city ordinance requiring the claimant to give his residence for one year last past is an unreasonable requirement. I therefore dissent.

FULLERTON, J., concurs with MOUNT, J.

[No. 7570. Decided December 8, 1908.]

J. H. McCAUSLAND *et al.*, *Appellants*, v. M. S. BAILEY *et al.*, *Respondents*.[1]

APPEAL — NOTICE — TIME FOR TAKING APPEAL — TAXATION—FORECLOSURE PROCEEDINGS. The time within which an appeal must be prosecuted from a final judgment in an equitable action to set aside a tax judgment and tax sale and quiet title must be determined by reference to Laws 1903, p. 75, relating to appeals from judgments in tax foreclosure proceedings, fixing thirty days, and not to the general law limiting appeals from final judgments to ninety days (FULLERTON and RUDKIN, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Morris, J., entered January 8, 1908, dismissing an action to set aside a tax deed and quiet title, upon sustaining demurrers to the complaint. Appeal dismissed.

J. D. Bauer and *Thomas & Rutherford*, for appellants.

Louis Henry Legg, for respondents.

DUNBAR, J.—This action was brought by plaintiffs against the defendants, to set aside a tax foreclosure judgment, sale

[1]Reported in 98 Pac. 327.

and deed, and quiet title in plaintiffs, as against the defendants, in and to lots 11 and 12, block 11, Lake Union Second Addition to Seattle, the defendants claiming title to said lots under a tax deed. A demurrer was sustained to the plaintiffs' complaint; an amended complaint was filed, to which, also, a demurrer was sustained; and the plaintiffs electing to stand upon their amended complaint, judgment of dismissal was entered, from which this appeal is taken.

Respondents move the court to dismiss the appeal of appellants, and for judgment against appellants and the sureties on their bond, for the reason that the appeal was not taken within thirty days after the date of the entry of the judgment. This motion, we think, must be sustained. Pierce's Code, § 8698 (Laws 1903, p. 75), relating to judgments in tax foreclosure proceedings, provides as follows: "Appeals from the judgment of the court may be taken to the supreme court at any time within thirty days after the rendition of said judgment," etc. This provision has been construed by this court in *Brown v. Davis*, 36 Wash. 135, 78 Pac. 779; *Pedigo v. Fuller*, 37 Wash. 529, 79 Pac. 1129; and *Harris v. Levy*, 39 Wash. 158, 81 Pac. 550; where it was held that said limitation on the time of appeals applied to judgments in tax foreclosure proceedings and upon orders denying motion to vacate the tax foreclosure judgment. The only distinction between those cases and the case at bar is that this is an action in equity to set aside a tax foreclosure judgment. But in *Brown v. Davis, supra*, this court, in discussing the claim that was made in that case that the statute did not apply to actions where the vacation of the judgment was sought, said:

"But appellant further urges that, in any event, the statute especially relates to appeals from a tax foreclosure judgment only, and that this is not such an appeal, but is one from an order refusing to vacate a judgment. It is argued that, since the revenue statute does not, in terms, refer to appeals from such orders or judgments, as the one sought to be reviewed here, we must therefore refer to the general statute relating to appeals. If the general statute applies here the

appeal was taken in time. The judgment was final as to appellant's demand, and the appeal was taken within ninety days. The revenue statute cited, in terms, provides that 'appeals from the judgment of the court may be taken to the supreme court at any time within thirty days,' etc. It is true, the judgment theretofore specially mentioned in the statute is the one foreclosing the tax lien, but the words 'the judgment of the court' seem to be broad enough to comprehend any final judgment rendered in the action against the owner of the land whereby he is deprived thereof."

It seems to us that the reason of the court in that case applies equally to the case at bar, and that the action in this case is in effect an action to vacate the judgment. When the court refuses to vacate a judgment, the whole matter in controversy is ended; and upon the trial of the cause in the equitable action to set aside the judgment, the result is exactly the same. There were two modes of attack, either of which could have been adopted by the appellants in this case; to move directly in the tax foreclosure to vacate the judgment, as in the case just cited, or to bring an independent suit in equity for that purpose, as the appellants here have done. The final effect being the same, it would seem that the object of the law in limiting the time for appeal in tax foreclosure proceedings would equally apply to both. In addition to this, it has been the uniform holding of this court that judgments stand upon the same footing, whether rendered in the original action on motion to vacate or in an independent action brought for that purpose. *Post v. Spokane*, 35 Wash. 114, 76 Pac. 510; *Sengfelder v. Powell-Sanders Co.*, 40 Wash. 686, 82 Pac. 931.

In *Sengfelder v. Powell-Sanders Co.*, *supra*, this court said:

"Outside of authority, it is manifest that the only result of the action in either case is to obtain a new trial. Hence, it is in effect a proceeding in the case, and the form of the action is entirely immaterial."

The same may be said here—that the result sought is the same whether the proceedings be a motion in the case to vacate

the judgment, or an action in equity to set aside the judgment. The form of the action is equally immaterial. It is true, it is suggested by the respondents that a demand is also made in the complaint in this action for the quieting of the title to the lands in question in the appellants. But this, of course, is only an incident to the main issue, a result which would naturally follow if the appellants should have prevailed.

The motion to dismiss will be sustained.

HADLEY, C. J., MOUNT, and CROW, JJ., concur.

FULLERTON, J. (dissenting)—I am of the opinion that appeals in actions of this character are governed by the general statute relating to appeals, and not by the special statute regulating appeals from tax judgments. I think the case should be decided upon its merits, and I therefore dissent from the judgment directed to be entered.

RUDKIN, J. (dissenting)—Inasmuch as the judgment appealed from should be affirmed on the merits, I concur in the result; but I am clearly of the opinion that the time within which an appeal must be prosecuted from a final judgment in an equitable action to set aside a tax judgment and tax sale and quiet title is regulated and controlled by the general appeal statute, and not by the special statute regulating appeals from tax judgments.

[No. 7434. Decided December 9, 1908.]

CHARLES PREGENT, *Respondent*, v. D. O. MILLS *et al.*, *Appellants*.[1]

BAILMENT—LOSS OF MONEY—PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF. In an action to recover money deposited for safe keeping, the law presumes negligence if the money is lost, whether the bailment was gratuitous or not, and the burden of proof is therefore upon the defendant.

SAME—EVIDENCE—CROSS-EXAMINATION. In an action to recover money deposited in a saloon safe for safe keeping, it is not error to permit cross-examination of the defendant as to his whereabouts on different occasions prior to the bailment.

SAME—PLEADING—CONVERSION. An allegation of the deposit of money for safe keeping and a failure to return it, in effect alleges a conversion; rendering admissible evidence of the defendant's visits to the race track and betting on the races.

SAME—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for the recovery of money deposited in a saloon safe for safe keeping, which was lost, the reasonableness of the explanation of the defendant as to why he could not return the money is for the jury, although there was no contradictory evidence; also, the question of the bailee's care, in leaving the safe under a half lock, in charge of a barkeeper.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 20, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the recovery of money deposited for safe keeping. Affirmed.

Sayre & Sutherland, for appellants.

Reynolds, Ballinger & Hutson, for respondent.

DUNBAR, J.—This is an action at law brought for the recovery of money deposited by the respondent with Mills & Smith, copartners, engaged in the saloon business. The amount in controversy is $530. The respondent, on the 25th

[1]Reported in 98 Pac. 328.

day of July, 1907, came to appellants' saloon and deposited in their safe, for safe keeping for him, the said sum of $530 in gold. The money was placed in a buckskin sack in the presence of the respondent. The sack was tied and placed in appellants' safe, which was behind and near the closed end of the bar. The safe was an ordinary iron safe. It is conceded that no consideration was received by appellants for keeping respondent's money. At this time appellants had in their employ a bartender named Axel Johnson. He was present and saw respondent deliver the money to appellants. It is the contention of the appellants that, so far as they knew, Johnson did not know the combination of the safe, nor did any one save the appellants. It was their custom to lock the safe at closing time, about one o'clock a. m. of each night, and to open at about 10:30 the following morning, and to keep the safe locked during the day on half combination. It is admitted that the safe was behind the bar, and that a bartender, by making special effort, could ascertain the means of opening the safe when on half combination, it being necessary to open and close the safe a number of times throughout the day.

On the night of either the 30th or 31st of July, one of the appellants, in checking the contents of the safe, discovered that the sack containing the respondent's deposit was missing. It appears that, earlier in the evening, the appellant Smith had left the saloon for his evening meal, remaining away about thirty-five minutes and leaving the barkeeper Johnson in charge. Upon the discovery that the sack was missing, the fact was reported to a detective, and suspicion centered on Johnson, who was placed under arrest, but subsequently released. He was again arrested on complaint made by Smith, and was again subsequently released by order of the prosecuting attorney. The money not being returned, this action was commenced. At the beginning of the trial the court ruled that the burden of proof was on the defendants. After the close of all the testimony, appellants moved for a nonsuit,

which motion was denied, and the cause submitted to the jury. The jury returned a verdict in favor of respondent. Appellants thereafter moved for judgment *non obstante veredicto*, and also for a new trial; which motions were denied by the court and judgment entered in favor of respondent, from which judgment this appeal is taken.

The assignments of error are (1) that the court erred in placing the burden of proof on appellants; (2) in permitting respondent to cross-examine the appellant Smith as to his whereabouts on different occasions prior to the bailment; (3) in permitting the cross-examination of the appellant Mills with reference to the appellant Smith frequenting the race track and betting on the races; (4) in denying appellants' motion for a nonsuit; (5) in denying appellants' motion for judgment *non obstante veredicto*; (6) in denying appellants' motion for a new trial; (7) in rendering judgment in favor of plaintiff.

To sustain the first assignment, it is urged that this was a case of gratuitous bailment, and that the ordinary rule that, if the property bailed is not returned, the law presumes negligence in the bailee and the burden is upon him to show that the loss is not due to his negligence, does not apply in the case at bar, because the character of the bailment was in issue, the reply of the plaintiff denying that the bailment was gratuitous. The court instructed the jury that under the testimony this was a gratuitous bailment, and that question was removed from the consideration of the jury. Even if this were not true, the rule would be the same whether the bailment was gratuitous or not, the only distinction being in the amount of diligence required by the bailee. There seems to have been no error of the court in regard to permitting the cross-examination complained of.

It is admitted that, if the pleadings had raised the issue of a conversion, it might have been proper for the respondent to get before the jury evidence of appellant Smith's visits to the race track; but it was improper, for the reason that no con-

version was alleged. But the complaint does, in effect, allege conversion by alleging the deposit of the money and appellants' refusal to return it on demand. This, in the absence of a showing of a sufficient excuse, would constitute a conversion.

The other assignments of error go to the merits of the case on the testimony offered, and could only be sustained on the theory that the jury was bound to believe and accept the testimony of appellant Smith as true. This they were not compelled to do. A bailee's explanation of why he did not or could not return the money may be so inconsistent that the jury is not compelled to believe it, notwithstanding there may not be any other testimony in the case. If this were not the rule, no judgment could ever be returned against a bailee who has appropriated the money intrusted to him to his own use. The reasonableness of the explanation offered must of necessity be a question for the jury to determine. The jury also had a right to determine from the testimony whether the bailee had exercised sufficient caution in leaving the money deposited with him in the charge of a barkeeper who was in their employment, under such circumstances as were testified to in this case.

There being no error discoverable in the record, the judgment is affirmed.

HADLEY, C. J., RUDKIN, MOUNT, CROW, and FULLERTON, JJ., concur.

[No. 7474. Decided December 11, 1908.]

GEORGE C. DIETRICH, *Respondent*, v. HANS PEDERSON *et al.*, *Appellants*.[1]

APPEAL—REVIEW—EVIDENCE—EXCEPTIONS. In a trial before the court without a jury, an exception to the refusal to consider evidence, which was admitted "for what is was worth," is unavailing, as the evidence is before the supreme court for review.

SAME. Findings in an action at law made by a judge who saw the witnesses will not be disturbed when the supreme court is not convinced that they are against the weight of the evidence.

Appeal from a judgment of the superior court for King county, Honorable Daniel Kelleher, Judge *pro tem*, entered March 5, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on contract. Affirmed.

Robert H. Lindsay, for appellants.

Roberts & Hulbert, for respondent.

DUNBAR, J.—This action was brought by respondent against the appellants for an alleged breach of a contract for the doing of certain plastering work by appellants for respondent, the appellants agreeing to have the work done by a certain time. It is alleged they failed to perform their contract, whereupon the respondent did the work and sued for the difference between the contract price and the cost of doing the work. The appellants answered, denying and affirming many things, but the substantial contention under the answer is that the contract sued upon had been mutually abandoned and abrogated, and that they were under no contractual obligation to the respondent. The court made findings of fact upon all material issues, and rendered the judgment complained of in favor of respondent.

[1]Reported in 98 Pac. 611.

The findings of fact were excepted to by the appellants, and are assigned as error. Only one assignment involving a legal question is presented, viz., that the court erred in refusing to consider appellants' testimony concerning an alleged oral agreement between the parties to the suit in reference to respondent's furnishing appellants the means to hoist their material, etc. Counsel for appellants cannot mean that the court refused to admit this testimony, for the record shows that such testimony was admitted by the court over the objection of counsel for respondent, the court remarking that it would be admitted for what it was worth; in fact, the court made a finding on that special subject. If it is meant that the court erred in refusing to consider the testimony which was admitted because he thought it tended to vary the terms of a written contract, this court has no way of determining that fact. In any event, it would not constitute error, for the testimony is here for our consideration.

With this exception, only questions of fact are presented, and without going into any unprofitable analysis of the conflicting testimony presented, we are not convinced by an examination of all the testimony that the weight of the evidence is against the findings of the court. In such case we will not disturb the findings made by the judge who saw the witnesses and heard them testify.

The judgment is affirmed.

FULLERTON, RUDKIN, and MOUNT, JJ., concur.

CHADWICK, J., took no part.

[No. 7600. Decided December 11, 1908.]

MINNIE E. KELLY, *Respondent*, v. HUGO N. KUHNHAUSEN *et al.*, *Appellants*.[1]

TAXATION—TAX TITLE—PROCESS—NAME OF DEFENDANT—IDEM SONANS. The misnaming in a tax foreclosure summons of Minnie E. Tiller, the owner, as Minnie E. Tilter is not ground for setting aside the tax title, as the same comes within the rule of *idem sonans*.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 18, 1908, in favor of the plaintiff, upon stipulated facts, in an action to set aside a tax title. Reversed.

C. J. Stephanus, for appellants.

Walter S. Fulton, for respondent.

DUNBAR, J.—The facts in this case are stipulated. The respondent, Minnie E. Kelly, plaintiff below, was formerly Minnie E. Tiller, and took title to the real estate in question in that name, December 8, 1897. The taxes for 1900, 1901, and 1903 were allowed to become delinquent. On July 28, 1904, a certificate of delinquency for the delinquent taxes of 1900 was issued to Hugo N. Kuhnhausen. On October 18, 1904, the holder of the certificate of delinquency began an action to foreclose the same, but named as the parties defendant thereto "Minnie E. Tilter and John Doe Tilter, her husband, whose true first name is to plaintiff unknown, and all persons unknown, if any, having or claiming an interest or estate in and to the hereafter described real property." The only service had was by publication, addressed to the defendants as stated above, Minnie E. Tiller being a nonresident of the state during all the time mentioned herein. No appearance was made by any of the defendants, and judgment and sale followed, the defendant Fred Nuglisch claiming through the purchaser at

[1]Reported in 98 Pac. 603.

the tax sale. This action was brought to set aside the tax proceedings because the notice or summons thereunder was addressed to Minnie E. Tilter instead of Minnie E. Tiller. On the trial of the cause, judgment was rendered in favor of the plaintiff, the respondent here, and appeal followed.

The appellants contend that the names Minnie E. Tilter and Minnie E. Tiller are *idem sonans*, and that the court erred in holding that they were not. This is really the only question to be determined in the case.

"*Idem sonans* is said to exist if the attentive ear finds difficulty in distinguishing them when pronounced, or if common and long-continued usage has by corruption or abbreviation made them identical in pronunciation." *State v. Griffie*, 118 Mo. 188, 23 S. W. 878.

The same definition might be brought into requisition where the duty devolves upon the eye instead of the ear to distinguish the names.

"The rule of *idem sonans* is that absolute accuracy in spelling names is not required in legal documents or proceedings, either civil or criminal; that if the name as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the sound of the correct name as commonly pronounced, the name as thus given is a sufficient designation of the individual referred to, and no advantage can be taken of a clerical error." *Hubner v. Reickhoff*, 103 Iowa 368, 72 N. W. 540, 64 Am. St. 191.

It is said in *State v. White*, 34 S. C. 59, quoting from *Schooler v. Asherst*, 1 Littell 216, 13 Am. Dec. 232:

"The doctrine of *idem sonans* has been much enlarged by modern decisions to conform to the growing rule that a variance, to be material, must be such a one as has misled the opposite party to his prejudice."

and quoting from *Ward v. State*, 28 Ala. 60:

"The books abound in hair-breadth distinctions; but we apprehend the true rule to be, that if the names may be sounded

alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial;" the court holding that "Canada McCutcheon" and "Kernedy McCutcheon" are *idem sonans*. The decisions on this question are numerous and irreconcilable, some courts holding that certain names fall within the rule while other courts refuse to apply the rule to similar names which are equally indistinguishable. The cases are compiled in 21 Am. & Eng. Ency. Law (2d ed.), pp. 313 to 317, inclusive, and for the reason above stated it would be profitless to cite and analyze the hundreds of cases there presented. But we think, under the overwhelming weight of authority, that the names under discussion are *idem sonans*.

One of the strongest cases presented by the respondent in opposition to this contention is *Chamberlain v. Blodgett*, 96 Mo. 482, where in a tax foreclosure case it was held that, where the proceedings were against M. B. Miller and the true name of the owner, a nonresident, was M. B. Millen, the court acquired no jurisdiction. It will be noticed, however, that both Miller and Millen are common names, which would not attract any particular attention to the listener or the hearer. It will be further observed that only the initials in each case are set forth. Whether the court would have so ruled had there been a full Christian name used, as in this case, is problematical. The question is not, are the names Tiller and Tilter detached and unassociated with anything else *idem sonans*. It might be possible that so considered they would not be, although it must be confessed that the similarity in sound is so great that, were the names pronounced by an ignorant person, or one who was careless in articulation or whose voice was inclined to be husky, the difference in sound would scarcely be perceptible. For the names must be construed with reference to their associations; that is, in this case with reference to their respective initials or given names, and considering them altogether the question is, would the variance mislead. The only variance in this case is the substitution of

the letter "t" for the second letter "l". In the first place, it is not a common name. In the second place, the initial "E" is the same; and in the third place, the given name "Minnie" is the same. So that it seems to us that the pictures presented to the eye of the ordinary reader are so nearly identical that the danger of being misled is too remote and improbable to justify the annulment of an otherwise valid judgment. And if the party has not been misled, of course the mistake, however flagrant in itself, will be harmless.

The judgment will be reversed, with instructions to dismiss the action.

FULLERTON, RUDKIN, and MOUNT, JJ., concur.

CHADWICK, J., took no part.

[No. 7632. Decided December 11, 1908.]

JOSEPH KUHNIS, *Appellant*, v. LEWIS RIVER BOOM AND LOGGING COMPANY, *Respondent*.[1]

NAVIGABLE OBSTRUCTIONS—DAMAGES FROM BOOM—ACT OF GOD. The maintenance of a boom in a navigable river whereby the overflow from extraordinary floods is turned against and washes away the opposite banks, renders the owner of the boom liable for the damages; and the same cannot be excused on the plea that an extraordinary flood is an act of God, where floods of equal or greater force had been known six or seven times, since the flood might have been reasonably anticipated.

SAME—INSTRUCTIONS. In an action for damages from the maintenance of a boom in a navigable river, causing a flood to wash away the opposite banks, error in instructing that an extraordinary flood is an act of God, imposing no liability upon the owner of the boom for damage done, is not cured by a subsequent instruction to the effect that there would be no liability if the damage was caused by sudden unusual floods that could not be anticipated or guarded against; prejudice being presumed from error until the contrary conclusively appears from the record.

SAME — DAMAGES — MITIGATION. In an action for damages for diverting flood waters of a stream and washing away plaintiff's barn and contents, it is error to instruct that the plaintiff cannot recover

[1]Reported in 98 Pac. 655.

any damage for their loss, if he refused to permit the defendant to remove the property to another location of safety; since plaintiff was not bound to incur extraordinary expense disproportionate to the results, and there would be at least an element of damage in the choice of location and value of the property after it was moved.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered November 27, 1907, upon the verdict of a jury rendered in favor of the defendant, in an action in tort. Reversed.

Pearcy & Wintler and *John T. McKee*, for appellant, contended, among other things, that the act of God was not set up as a defense, and therefore evidence of a state of facts amounting to an act of God is not admissible. *Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. 354; Bailey, Onus Probandi, 296; *Hunter v. Grande Ronde Lumber Co.*, 39 Ore. 448, 65 Pac. 598. The facts proved did not constitute an act of God, but were such manifestations of nature as confessedly have occurred frequently within the memory of man, and may be reasonably expected to occur again. *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 South. 374; *Southern R. Co. v. Plott*, 131 Ala. 312, 31 South. 33; *Pittsburg etc. R. Co. v. Gilleland*, 56 Pa. St. 445, 94 Am. Dec. 97; *Gulf etc. R. Co. v. Pomeroy*, 67 Tex. 498, 3 S. W. 722; *International & G. N. R. Co. v. Halloren*, 3 Am. & Eng. R. R. Cases 343, 53 Tex. 46. Inasmuch as there was no act of God pleaded or proved, the instructions to the jury defining the act of God, and defining the liability of respondent in case an act of God concurred in or caused the injury, was error. *Breon v. Henkel*, 14 Ore. 494, 13 Pac. 289; *Woodward v. Oregon R. & Nav. Co.*, 18 Ore. 289, 22 Pac. 1076; *Anderson v. Oregon R. Co.*, 45 Ore. 211, 77 Pac. 119. It was error to instruct that the defendant would not be liable if the floods were sudden and unusual, even though the boom or its operations contributed to the injuries. 1 Am. & Eng. Ency. Law (2d ed.), pp. 575, 592-595, note 1; 2 Parsons, Contracts (5th ed.), 159; *Smith v. North American T. & T. Co.*, 20

Wash. 580, 56 Pac. 372, 44 L. R. A. 557; *Bullock v. White Star S. S. Co.*, 30 Wash. 448, 70 Pac. 1106; *Quincy Gas & Electric Co. v. Schmitt*, 123 Ill. App. 647. The only duty of a person, injured by the wrongful act of another, is to minimize his damages, where the same can be done, with ordinary effort and expense, and the third instruction therefore was error. 1 Sutherland, Damages (3d ed.), § 88; 13 Cyc. 75, 76: 8 Am. & Eng. Ency. Law (2d ed.), 605, 606, 607; *Galveston etc. R. Co. v. Ryan* (Tex. Civ. App.), 21 S. W. 1013; *Hurxthal v. St. Lawrence Boom & Lumber Co.*, 53 W. Va. 87, 44 S. E. 520, 97 Am. St. 954; *Armistead v. Shreveport etc. R. Co.*, 108 La. 171, 32 South. 456.

A. L. Miller, for respondent.

DUNBAR, J.—This action was commenced by plaintiff to recover damages from the defendant for the washing away of a portion of plaintiff's premises and property, alleged to have been caused by the construction and maintenance of a boom owned and operated by defendant in the Lewis river, on the opposite side of the river from plaintiff's land. The case was tried to a jury, and a verdict returned in favor of defendant. Plaintiff appeals.

Lewis river is a navigable, meandered stream, and respondent is a corporation, organized under the laws of the state of Washington for the purpose of constructing and operating a public boom. The question at issue on the trial was whether the boom caused the current to set across the stream and against the shore with greater volume and with more destructive force than it would have done if the boom had not been constructed where it was. The following instructions, among others, were submitted by the court to the jury, and the giving of such instructions is assigned as error by the appellant:

"(1) An extraordinary flood is an act of God, and imposes no liability upon him whose lawful structure is an instrument causing damages to others. The defendant was and is only bound to build and maintain its said boom as reasonable men

can foresee shall be necessary to meet the ordinary contingencies and demands of nature, and cannot be held liable for these extraordinary visitations whose comings could not have been anticipated or guarded against by the exercise of ordinary foresight.

"(2) If the flood or floods that caused the damage to plaintiff's land were sudden and unusual floods whose comings could not have been anticipated or guarded against by the exercise of ordinary foresight, then the defendant is not liable for any damages caused thereby, notwithstanding the boom or its operations have contributed to the washing away of plaintiff's land.

"(3) As to these items (referring to the barn, $1,000; hay $975, and feed $25, as per transcript, page 21), the question has been raised that the loss of same was due to the negligence of plaintiff in not saving same when he had an opportunity. If you find defendant offered to remove this property to a place of safety, or assist in doing so, and the same could safely have been done, but was not done on account of plaintiff's refusal to save or permit this property to be saved, then you are to allow no damages on account of the loss thereof."

The term "Act of God" has received multifarious definitions. It is defined in "Words and Phrases Judicially Defined," page 118, as follows:

"It is said to be that which is occasioned exclusively by the violence of nature; by that kind of force of the elements which human ability could not have foreseen or prevented, such as lightning, tornado, sudden squall of wind, and the like. Again, it is said to be, at least, an act of nature which implies entire exclusion of all human agency whether of the carrier himself or of third persons. It is called a disaster with which the agency of man has nothing to do. It is defined to be a natural necessity, which could not have been occasioned by the interference of man, but proceeds from physical causes alone."

And a multitude of cases are cited to sustain these definitions. In *Niblo v. Binsse*, 44 Barb. 54, it is defined as any inevitable accident, and is construed to mean in law something in opposition to the act of man. In *Klair v. Wilmington Steamboat Co.*, 4 Penn. (Del.) 51, 54 Atl. 694, it is said that by act of

God is meant some inevitable accident which cannot be prevented by human care, skill, or foresight. It has also been described as involving some notion of an accident from natural causes impossible to be foreseen and impossible to be guarded against. In *Tompkins v. Dutchess of Ulster*, Fed. Case. No. 14,087a, the court said that the act of God which excuses a common carrier from liability must be the immediate and distinct result of providential events, sudden or overwhelming in their character, which human foresight could not foresee. It would not be profitable to incorporate any further definitions of the term in this opinion.

It is contended that the court erred in instructing the jury that an extraordinary flood was an act of God and imposed no liability upon him whose lawful structure was an instrument causing damage to others. We think this contention must be sustained. In the first place, there was no allegation in the answer that the accident complained of was caused by the act of God, and neither was there any proof offered to that effect, the proof being that the flood which caused the damage was extraordinary, but not that it could not have been reasonably anticipated and guarded against by ordinary prudence; for the testimony was that, during the life of citizens in that community, floods equal to the one in question had been known some six or seven times, on some occasions even higher than it was at the time the damage was wrought.

The respondent contends that, notwithstanding the fact that the first instruction of the court might be erroneous, it was error without prejudice, for the reason that the subsequent instruction of the court properly stated the law, and that the jury would understand that the court was referring to floods which ordinary prudence could not have foreseen or guarded against. But the term "Act of God" is an expression which conveys a portentous thought to the minds of common people. When the court instructed the jury that an extraordinary flood was an act of God imposing no liabil-

ity upon the defendant in the case, and the evidence showed that the flood was extraordinary in the sense of not occurring every year, it is plain that the jury were misled by this instruction. In any event, it is the universal rule of this court that, when it is determined that error has been committed, the presumption that it was without prejudice must conclusively appear from the record. The court having injected into the case an element neither raised by the pleadings nor sustained by the testimony, and it not affirmatively appearing that the error was not harmful, we must conclude that the action of the court in the matter complained of constituted prejudicial error.

In *Gulf, Colorado & S. F. R. Co. v. Pomeroy*, 67 Tex. 498, a distinction is made between prudence required of a person where his own property is in danger, and that required where the property of other persons is involved, the court saying:

"A careful person in constructing a like improvement which endangered his own property, might prefer to take the risk of a loss from either ordinary or extraordinary floods to incurring the certain expense necessary to make an effectual provision against them. But this rule certainly would not do, when the property of others is subjected to the risk of destruction or damage. In our opinion the true test is, considering all the circumstances and especially the history of the stream, would a prudent man have anticipated such a flood as caused the damage. . . . Knowing that an extraordinary inundation has occurred more than once, and for that reason that it may occur again, a party who has constructed a work which obstructs its outflow and causes it to submerge the property of another to his damage, will not be permitted to defend against the wrong by setting up the fact that the floods not provided for have occurred only at long intervals."

This case seems to be exactly in point, and it seems to us states the law fairly, the testimony in this case showing that a flood of equal height and velocity had occurred several times prior to the occurrence of the one involved in this action. The contention of the appellant is not unreasonable, that the

result which would follow the instruction of the court would be unjust and that protection against an ordinary flood which occurs every year, simply to preserve the property for destruction by an extraordinary one, known to occur every six or seven years, after improvements had been made upon the land and it had been made more valuable, could not be justified under any theory of law or right. The further citation of cases, it seems to us, is unprofitable. We have examined many and are unable to find any case, including the cases cited by the respondent, that would sustain the instructions given in the matter complained of.

Again it is contended, and we think with justness, that the court erred in the third instruction complained of. In the first place, the court's instruction was in the alternative, that "if the defendant offered to remove this property to a place of safety, or assist in doing so." In order for the respondent to escape the responsibility, it must have offered to remove the property at its own expense. The duty of the appellant being only to make ordinary effort for the preservation of the property, it was not bound to make extraordinary effort or incur extraordinary expense disproportionate to the results to be obtained. Nor would his failure to make any effort result in depriving him of all damages, the law imposing upon him only the duty to minimize the damages. But conceding, without deciding, that the doctrine of minimizing the damages can arise in this kind of a case at all, in any event, the instruction was too broad and left out elements which must in all conscience be considered. The learned counsel for the respondent says the boom was a lawful structure, doing a legitimate business, and that if during a flood the boom increased the flow of water past the appellant's premises, and respondent, seeing the danger, offered to save the property free of cost, the appellant could not refuse to permit it to do so and still hold it responsible. But in addition to the fact that the statement in the brief is broader than the instruction to the court, there certainly must be an element

of choice in the matter of the location. A man usually locates his barn or his house with reference to the convenience of the location. The barn or the house is also a lawful structure doing a legitimate business, and it might very reasonably happen that the value of a barn would be very largely depreciated by moving it to another location, with reference to ingress and egress to and from the barn, and with reference to many things that are ordinarily taken into consideration when a barn is located. This choice of location cannot be taken from the owner and given to somebody else. A person who wishes to go into a business, be it ever so legitimate, cannot say to another person who has his houses and buildings on a certain location which has been chosen by him, "You must permit me to move your houses to another location on your premises or the business which I am instituting will damage them, and if you do not permit me I will not be responsible for the damages incurred." So that at least there must be taken into consideration the difference between the value of the property after it is moved and its value where it was located by its owner.

We think, for the reasons assigned, that the judgment must be reversed and a new trial granted.

HADLEY C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

CHADWICK, J., took no part.

[No. 7515. Decided December 11, 1908.]

NATIONAL BANK OF COMMERCE, *Appellant*, v. FRANK GOUGAR, *Respondent*.[1]

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—ADMISSIBILITY—ACCOUNT STATED. In an action upon an account stated, which was to recover sums alleged to have been advanced and paid to defendant to be used by him in operating a certain mill, oral evidence on the part of defendant that the mill belonged to the plaintiff and was operated by him for the plaintiff and that the sums were paid for plaintiff's benefit and at its request under a verbal contract for defendant's remuneration, is not inadmissible as varying the terms of a written lease of the mill, claimed by the plaintiff to have been made to the defendant, where the existence of the lease was not an issue or mentioned in the pleadings, but merely a collateral matter disputed by the defendant, and incidentally raised at the trial to contradict the evidence of the verbal agreement.

EVIDENCE—OFFER TO COMPROMISE—ADMISSIBILITY. In an action on an account stated, evidence of defendant's offer to compromise is properly struck out.

APPEAL—REVIEW—VERDICTS. The verdict of a jury will not be set aside because against the preponderance of conflicting evidence.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered January 17, 1908, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

Blattner & Chester and *L. B. da Ponte*, for appellant.

Ellis, Fletcher & Evans, for respondent.

HADLEY, C. J.—This is an action for the recovery of money. The complaint alleges an indebtedness from the defendant by reason of an account stated, in October, 1905, in the sum of $81.18, and that thereafter on different dates the plaintiff paid, at the request of the defendant, additional sums, aggregating with the amount of the account stated, $6,727.05. A credit on the above amount by reason of pay-

[1]Reported in 98 Pac. 607.

ment in the sum of $1,278.37 is allowed in the complaint, and judgment is asked for $5,448.68.

The answer denies the material averments of the complaint, and affirmatively alleges that the plaintiff, which is a banking corporation, in June, 1905, bid in at receiver's sale the assets of the Washington Lumber Company, a debtor of the bank; that the bid was taken in the name of the defendant, for the bank and at its request; that the property was deeded by the receiver to the defendant and immediately transferred by the latter to the plaintiff. The property included a sawmill plant, and the defendant alleges that, after he made the transfer to the plaintiff, the latter desiring to operate the mill, verbally agreed with the defendant that the latter should manage and operate it for plaintiff; that the plaintiff should pay all operating expenses and would purchase all necessary machinery and appliances for such operation; that the plaintiff was to receive all moneys derived from the operation of the mill, and if the operation proved profitable, then when the profits should equal the amount of the original indebtedness of the Washington Lumber Company to the plaintiff, about $25,000, the plaintiff would convey the property to the defendant to compensate him for his management and labor in the operation of the mill.

It is further alleged that, under the above agreement, the defendant did operate the mill until the repair of the boilers therein became necessary, and that inasmuch as the plaintiff did not desire to incur the expense of renewing the boilers, it was mutually agreed that the operation of the mill should be abandoned and the property was then turned over to the plaintiff, since which time the defendant has had no connection with it. It is alleged that the plaintiff paid the operating expenses while the defendant was in charge of the mill, and that for convenience in bookkeeping, the defendant, at plaintiff's request, drew checks covering the payrolls and the cost of the machinery up to the time the operation of the mill was abandoned, which checks were paid by the plaintiff under

the agreement aforesaid, and not otherwise. The payment of these checks is the basis of the plaintiff's demand in this suit, but the defendant denies liability for the alleged reason that the plaintiff was simply paying for the operation of its own mill under an agreement to do so. The cause was tried under the above issues, and a verdict was returned for the defendant. Judgment was entered upon the verdict that the plaintiff shall take nothing by the action, and it has appealed.

It is assigned that the court erred in permitting the respondent to testify that he had the verbal agreement with appellant which is set up by the answer, in view of the fact that appellant claimed there was a written lease subsequently made by it to respondent for the mill. It is argued that the oral testimony had the effect to contradict the terms of a valid written instrument. The action is, however, not founded upon a written instrument. It is a simple action for the recovery of money alleged to have been paid out by appellant for the benefit of respondent. There was no mention of a lease, or even of the mill, in the complaint, and the existence of any lease in fact was disputed when the subject arose on the introduction of testimony at the trial. The purported lease became merely collateral—an incidental matter, the purpose it served at the trial having merely the effect to contradict the theory of the respondent that the mill was operated according to the terms of the alleged verbal agreement. The fact as to the real agreement was for the jury to determine, having regard to all the evidence before them. We think there was no error in the above particular.

It is assigned that the court erred in striking the following testimony of the witness Albertson:

"About the time he went East I remember the matter came up and at that time we put a price on it. We had about $35,000 in the property, and I said to Mr. Gougar: 'You will have raised that price to pretty near $40,000 because it has been increased by what you lost in operation, by what you have run behind, and you must count that in or make good yourself,' and he seemed to think that was all

right, and tried to work on that basis; and even since then he made a proposition to us to secure the claim."

The record we think shows clearly that the court struck, and intended to strike, only the latter part of the answer which related to a probable offer to compromise by way of securing the claim. There was no prejudicial error in the ruling.

It is argued that a new trial should have been granted for the reason that the evidence was insufficient to justify the verdict. We think the record does not disclose such insufficiency. The conflict in the testimony was such as made it peculiarly for the jury to determine the question of preponderance, and since they found the greater weight of the evidence to be in favor of the respondent, we will not disturb the verdict.

The last assignment of error, that a new trial should have been granted on the ground of newly discovered evidence, has been withdrawn by a written statement to that effect filed in this court since the briefs were prepared.

The judgment is affirmed.

RUDKIN, FULLERTON, DUNBAR, MOUNT, and CROW, JJ., concur.

CHADWICK, J., took no part.

[No. 7532. Decided December 11, 1908.]

ELIZABETH E. LEE, *Respondent*, v. FIDELITY STORAGE AND TRANSFER COMPANY, *Appellant*.[1]

FOREIGN CORPORATIONS—ACTIONS—PROCESS—SERVICE ON AGENT—DOING BUSINESS WITHIN STATE. A foreign corporation engaged in the business of assembling car load lots of household and other goods and forwarding them to, and distributing or storing them in, this state, through an agent located at S. in this state, which receives, distributes, or stores the goods here, is "doing business within this state," within the meaning of Bal. Code, § 4875, authorizing the service of summons upon "any agent."

CONTRACTS—EXISTENCE—BREACH—EVIDENCE—QUESTION FOR JURY. The existence of a contract to forward goods from St. Paul to Tacoma, and its breach, is for the jury, where the plaintiff's evidence was to the effect that there was a clean-cut contract for delivery at Tacoma without prepayment, and the defendant's agent refused to forward the goods from Seattle to Tacoma without full prepayment of the charges.

CARRIERS OF GOODS—DELIVERY—CHARGES — COLLECTION — PREPAYMENT—INSTRUCTIONS. In an action for conversion of goods it is proper to instruct that a "forwarder and distributer" of goods, which contracts to make delivery at a certain place without prepayment of charges, cannot collect its charges until the goods are delivered at their destination, it being immaterial by what name the defendant designates the nature of its business.

SAME — ACTION FOR NON-DELIVERY — CONDITIONS PRECEDENT. A demand for goods to be delivered by the defendant at T. under a contract to pay charges on delivery, is not a condition precedent to an action for a conversion, where, before suit, the defendant's agent refused to forward the goods until prepayment of the charges, as the demand is thereby waived.

SAME—VALUE OF GOODS—EVIDENCE—SUFFICIENCY—PRESUMPTIONS. In an action for the conversion of goods delivered to the defendant at St. Paul to be forwarded to Tacoma, plaintiff's evidence of the value at St. Paul is sufficient evidence of the value at the time of their conversion, where the goods had not been used and were in possession of the defendant, and the defendant refused to show their real value at that time; as the presumption would arise that their value had not been reduced.

[1]Reported in 98 Pac. 658.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 8, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Totten & Rozema, for appellant.

W. G. Heinly (*Charles Bedford*, of counsel), for respondent.

HADLEY, C. J.—This is an action to recover the value of certain personal property, for failure to perform an alleged contract to deliver the goods. The complaint avers that the defendant is a corporation, existing under the laws of Minnesota for the purpose of storing, forwarding, and distributing goods, wares, and merchandise for hire, between St. Paul, Minnesota, and various other cities throughout the United States; that on the 12th day of November, 1906, the plaintiff's agent at St. Paul delivered to the defendant certain described goods belonging to the plaintiff, of the value of $350, which the defendant agreed to safely forward and deliver to the plaintiff at Tacoma, Washington. It is alleged that the defendant has failed and refused to deliver the goods to the plaintiff at Tacoma, wherefore she seeks to recover. The defendant denied liability, and after a trial before a jury, a verdict was returned for the plaintiff in the sum of $350. Judgment was entered upon the verdict, and the defendant has appealed.

The defendant moved specially to quash the service of summons. The summons was served upon the Bekins Moving and Storage Company of Seattle, as agent of the appellant. It is admitted that the company named was the agent of the appellant in this state for certain purposes, but it is contended that it is not an agent upon whom service of process could be made. It appears that the appellant engages in assembling car load lots of household and other goods from different persons, and in forwarding them to different points,

the purpose being to enable individuals who have less than car load lots of goods to avail themselves of the benefit of car load rates. When shipments are made to Seattle and vicinity, the Bekins Moving and Storage Company, of that city, acts as agent for the appellant to receive and distribute the goods, to store them if necessary, and to collect the shipping charges. This action was brought in King county where this agent of appellant resides. Under such conditions the appellant was doing business within this state, and the service upon such an agent was sufficient, within the following provision of Bal. Code, § 4875 (P. C. § 332):

"The summons shall be served by delivering a copy thereof, as follows: . . .

"9. If the suit be against a foreign corporation or nonresident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof."

See, also, *Sievers v. Dalles, Portland & A. Nav. Co.*, 24 Wash. 302, 64 Pac. 539. It was not error to deny the motion to quash the service.

It is next assigned that the court erred in denying appellant's motion for a directed verdict in its favor. We think there was sufficient evidence for the jury. The respondent's testimony was to the effect that appellant's contract was a clean-cut one to deliver to her, at Tacoma, the goods which her agent at St. Paul delivered to appellant there; that the compensation was agreed upon, and the goods were accepted without prepayment therefor. Respondent's testimony shows that the agent in Seattle refused to forward the goods from Seattle to Tacoma, or to deliver them at the latter place, unless the charges were fully paid in Seattle. If there was such a contract as respondent says there was, then the above constituted a breach of it. It was for the jury to say whether such a contract existed, and if so, it was immaterial whether appellant may have called itself a mere forwarder or forwarder and distributer. The contract itself controlled without regard to what appellant may have named its general business.

It is assigned that the court erred in charging the jury that appellant as a forwarding agent could not collect its charges until it had delivered the goods at their destination. The effect of the court's instruction was not to say that appellant was a mere forwarding agent; but rather that under a contract to forward goods from St. Paul to Tacoma, if that was the contract, the appellant was not entitled to collect the charges until the goods reached Tacoma, since it accepted them without prepayment. In other words, that appellant would not fully perform its part of the contract until it delivered the goods at the point of destination designated in the contract. The contention upon this instruction is based upon the argument that appellant was a mere forwarder, and was not a common carrier, and that the responsibilities of the two rest upon different principles. To our minds, however, as heretofore intimated, it is immaterial what appellant is called. If it undertook to deliver the goods at Tacoma, it was bound by its contract and could not recover its compensation until it had fully performed its own obligation in the premises. It accepted the goods without prepayment, and having done so, it was required to fully complete its contract before it could demand payment. Moreover, if the expressed purpose of appellant's business were material, it is in any event designated as both a forwarder and distributer, and the latter is sufficiently comprehensive, as a mere trade designation, to include the shipment of these goods from Seattle by appellant's agents and their delivery to its customer at Tacoma. We see no error in the instruction.

It is next assigned that the court erred in instructing that no demand for the goods was necessary if the appellant, through its Seattle agent, refused to deliver the goods until the charges were paid in Seattle. The instruction stated that, before a suit for conversion can be brought, there must be a demand and a refusal to deliver, but that, if the appellant knew the place of residence of the respondent, and through its agent in Seattle refused to forward the goods from Seattle

to Tacoma until the charges were paid in Seattle, then the necessity for a demand was waived, inasmuch as it is an idle thing to demand something which a person says he will not do. We see no error in the instruction.

It is contended that it was error to charge the jury in substance that, if there was a conversion, the appellant would be liable for the reasonable value of the goods at the time of the conversion, because it is also contended there was no evidence as to the value of the goods at the time of the alleged conversion. The best evidence the respondent could give as to the value was her own testimony. As the goods were not used after they passed into appellant's hands, she not unfairly presumed that they were of the same value as when received. She could not give the cost price and then show the extent of the depreciation, for the reason that the goods were in appellant's possession. Being in appellant's possession, it was in a position to show their real value; but it refused to do so, and it cannot now take advantage of its refusal. Under such circumstances it should be presumed that, if appellant had introduced proof, the value placed upon the property by respondent would not have been reduced. There was no prejudicial error in the instruction.

We think the charge of the court was in all respects sufficient, under the issues and facts, and we do not find any of the objections thereto well taken. The judgment is affirmed.

FULLERTON, CROW, and DUNBAR, JJ., concur.

CHADWICK, J., took no part.

[No. 7533. Decided December 11, 1908.]

CHARLES F. GARBERSON, *Respondent*, v. TRANS-CONTINENTAL FREIGHT COMPANY, *Appellant*.[1]

CARRIERS OF GOODS—CONTRACTS — CONSTRUCTION — BREACH — LIABILITY OF FORWARDER OR DISTRIBUTER OF GOODS. Where a foreign corporation contracts to forward and deliver goods for a specific sum, it is liable for failure to deliver in the manner agreed upon and for damage to the goods, regardless of whether it acted as a mere forwarder, or as a forwarder and distributer.

SAME—EVIDENCE OF CONTRACT—REMOTENESS. In an action for damages to goods, and for recovery of an excess charge, under a contract whereby defendant, a forwarder and distributer of goods, agreed to ship the goods from Ohio and deliver them at Seattle for a specified sum, evidence as to the railroad rates on similar goods is inadmissible to show the probabilities as to what the contract in fact was; the same being too remote and speculative, in view of the competition in such rates.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 18, 1908, upon findings in favor of the plaintiff, in an action on contract, tried before the court without a jury. Affirmed.

Totten & Rozema, for appellant.

Charles F. Garberson, for respondent.

HADLEY, C. J.—This is an action for damages arising out of a contract concerning the shipment of household goods. The plaintiff shipped the goods by the Erie railway from Marion, Ohio, to Chicago, where they were transferred and delivered into the possession of the defendant. The defendant was engaged in the business of assembling car load lots of goods for shipment to different parts of the United States, the purpose being to serve those who had less than car load lots, and enable them to avail themselves of car load shipping rates. The defendant is a corporation under the laws of Illinois, and the complaint alleges, that it maintains an agency office in Se-

[1]Reported in 98 Pac. 612.

attle in this state; that on March 31, 1906, at Chicago, it entered into an oral agreement with the plaintiff whereby it undertook to safely and carefully ship and deliver to the plaintiff at Seattle, without loss or damage, his household goods, furniture, and effects, for the agreed price of $160, which was paid in advance as full and complete payment of all charges for cartage, storage, and re-loading at Chicago, railway freightage from Chicago to Seattle, and including also all charges for unloading, storing, and delivering the goods to the plaintiff by the Bekins Moving and Storage Company, in Seattle, which latter company the defendant represented to plaintiff was the defendant's agent in Seattle for such purpose; that the said Seattle agent would, without additional charges, deliver the goods to plaintiff at any point in Seattle within the radius of any reasonable distance therein, on demand by plaintiff of the agent at any time within four days after notice of the arrival of the goods in Seattle; that the goods were received and accepted by the defendant upon the above agreement and terms, and upon no other or further condition whatever; that notwithstanding the agreement, the defendant so carelessly handled the goods while in its possession and control and during transit, and while in the possession and control of plaintiff's Seattle agent, that it failed to deliver them without damage, but that they were damaged to the extent of $248.10.

A second cause of action alleges that the defendant's Seattle agent, the Bekins Moving and Storage Company, exacted from the plaintiff the payment of the additional sum of $57.50 for cartage and storage in Seattle before it would deliver the goods at the plaintiff's residence in Seattle, although demand for their delivery was made upon the day of their arrival in Seattle. It is averred that the amount was paid under protest and in order that the plaintiff might secure the possession of his goods for immediate household necessities. Recovery of the amount so alleged to have been paid is sought, and judgment is demanded for the aggregate sum

of the above items. The answer denies the material parts of the complaint, and under such issues the cause was tried by the court without a jury, and resulted in a judgment for plaintiff in the sum of $210 on the first cause of action, and in the further sum of $57.15 on the second cause of action. The defendant has appealed.

The court made findings of facts and conclusions of law, and the assignments of error are mainly based upon these. The evidence sharply conflicts as to the true nature of the contract, but respondent and his wife each positively testified in support of the contract as alleged in the complaint. Both were present when the agreement was made in Chicago, and the record discloses no reason why the trial court should have discredited their testimony. The court found that the contract was in all essential particulars the same as set forth in the complaint, and that respondent was entitled to recover the amount of damage done to the goods, and also to recover back the cartage and storage exacted from him in Seattle by appellant's agent. We shall not disturb the findings.

The contract was, therefore, a straight undertaking to deliver to respondent in Seattle the goods in question without damage, and to cart them to his home, which was shown to have been within reasonable distance, without further charges. Under such a contract it was immaterial whether appellant was a mere forwarder or a forwarder and distributer. It undertook to do a special thing, and it was obligated, like any other person, to carry out its undertaking without regard to what name it may use in designating its business. In this respect the case is similar to cause No. 7532, *Lee v. Fidelity Storage & Transfer Co.*, just decided, *ante* p. 208, 98 Pac. 658, and what was there said with reference to a similar contract made by one engaged in a similar business is applicable here.

It is assigned that the court erred in refusing to allow appellant to show what the railroad rates were for shipping second-hand household goods from Chicago to Seattle, for

the purpose of showing the probability of what the contract between the parties was. We think such evidence was too remote and uncertain for that purpose. It certainly was immaterial for any other purpose under the issues, and when the possibility of sharp competition in rates between forwarding and shipping companies is considered, it will be seen that the offered evidence might not have thrown any light upon what the real contract was, and it might have been actually misleading.

The judgment is justified by the record, both as to the right of recovery and as to the amount of damages, and it is therefore affirmed.

FULLERTON, CROW, and DUNBAR, JJ., concur.

CHADWICK, J., took no part.

[No. 7717. Decided December 11, 1908.]

ANNA BENSON, *Respondent*, v. TACOMA RAILWAY & POWER COMPANY, AND RAY GARDNER, *Appellants*.[1]

CARRIERS—DEGREE OF CARE—PASSENGERS UNDER DISABILITY. A street car company that knowingly accepts for transportation an intoxicated passenger, is bound to exercise such special care and assistance as his condition requires in order that he may be safely transported.

SAME—EVIDENCE—QUESTION FOR JURY. Whether a street car company failed to exercise due care in allowing an intoxicated passenger to ride on the outside of the car, whence he fell to his death, is for the jury, where it was clearly shown that he was very intoxicated when he boarded the car or soon afterwards, and the conductor admitted knowledge of his intoxication, and by way of impeachment, it was shown that the conductor had stated that he was "drunk as h—l, and kept getting drunker."

APPEAL—REVIEW—HARMLESS ERROR — FAVORABLE TO APPELLANT. The giving of an erroneous instruction at the request of and favorable to the appellant, and one that conflicts with other correct instructions, does not constitute reversible error of which the appellant can complain.

[1]Reported in 98 Pac. 605.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 14, 1908, upon the verdict of a jury entered in favor of the plaintiff, in an action for the wrongful death of a passenger on a street car. Affirmed.

Blattner & Chester and *L. B. da Ponte*, for appellants.

F. D. Oakley and *John E. Gallagher*, for respondent.

HADLEY, C. J.—This is an action to recover damages for the death of the plaintiff's husband. The defendant, Tacoma Railway & Power Company, owns and operates a line of electric railway between the cities of Tacoma and Puyallup, in Pierce county, in this state. The complaint alleges that, about nine o'clock in the evening of November 4, 1907, the plaintiff's husband, Otto Benson, presented himself as a passenger on one of the above-named defendant's cars, which car was in charge of the defendant Gardner, who was the conductor and agent of the railway company; that when Benson presented himself as a passenger, he was so much under the influence of intoxicating liquor that he was unable to take care of himself; that knowing him to be in such condition, the defendants accepted him as a passenger and undertook to convey him to his destination; that his state of intoxication continued to increase during the time of his transportation, and the defendants knew that he was constantly becoming less able to care for himself as his state of intoxication increased; that the defendants, knowing his condition, carelessly and negligently permitted him to ride in a dangerous position on the platform of the car while he was in such a state of intoxication as to be unconscious and heedless of his danger; that the defendants, knowing his position was dangerous for one in his condition, neglected to exercise proper care and precaution to prevent injury to him, and failed to bestow upon him the degree of attention which his condition required in order to afford him a safe passage to his destination; that while in the aforesaid position and under the circumstances

stated, he fell from the car, striking his head upon the ground, and that he thereby received injuries from which he died.

The answer alleges that, when Benson boarded the car, there was nothing in his appearance or manner to indicate that he was intoxicated, and that his actions thereafter did not indicate that he was intoxicated to such an extent as to be either reckless or indifferent as to his safety, but that he was to some extent intoxicated; but while the car was running at a high rate of speed, he went to the rear platform where the defendant Gardner, the conductor, was, and that the latter immediately requested him to remain inside the car, as it was against the rules of the company to ride upon the platform; that the deceased then and there agreed to return to the car, but carelessly and negligently went too near the edge of the platform, and either stepped off or fell off. The cause was tried by a jury, and a verdict was rendered for the plaintiff in the sum of $4,000. Judgment was entered for the amount of the verdict, and the defendants have appealed.

The first assignment of error is that the court erred in overruling the motion for new trial on the ground that the evidence was insufficient to justify the verdict. It is argued that the testimony taken as a whole does not show that the appellants were guilty of any negligence which in any way contributed to the death of Benson. There was much testimony to the effect that he had been drinking much and often on the afternoon and evening of the day he was injured. One cannot read the record of the testimony and escape the conclusion that he was a badly intoxicated man when he presented himself as a passenger, and the appellants even admit in their answer that he was intoxicated to some extent. The degree of appellants' responsibility in the premises must be determined by the extent to which his intoxicated condition and his inability to care for himself were apparent. The general rule in such cases is stated as follows:

"While a railway company is not bound to accept for transportation without an attendant one who, because of physical

or mental disability, is unable to take care of himself, yet, if its servants do voluntarily accept such a person, unattended, they should render to him such special care and assistance as his condition requires in order that he may be safely transported. And the same principle applies to persons who are known to be partially or entirely helpless on account of intoxication or physical disability." 6 Cyc. 599.

The evidence conflicts as to the deceased's appearance with reference to his apparent inability to care for himself; but the testimony, we think, manifestly shows that, if his intoxicated condition was not apparent at the moment he boarded the car, it must have been apparent almost immediately afterwards. His conduct and manner must have revealed the fact to the conductor, soon afterwards, that he was apparently in a reckless state of intoxication. The conductor's own testimony is sufficient for the jury upon that subject, although he says it was not apparent to him that the deceased was unable to properly care for himself. By way of impeaching his testimony, it was testified that the conductor stated, after the accident and before the trial, that when Benson got on board the car he "was drunk as h—l, and kept getting drunker." Under all these circumstances, we think the only proper course was to leave it to the jury to say whether he was unable to properly care for himself and, if so, whether that condition was known to the conductor, and furthermore whether the necessary care commensurate with his condition and surroundings was extended to him by the defendants. It is true the conductor testified that he told him to leave the platform and go into the car, but it was again for the jury to say whether that was the exercise of sufficient care, having in view his condition and the entire environment. The jury having found that the appellants were negligent in the premises, we think the trial court did not err in refusing to grant a new trial on the ground of the insufficiency of the evidence.

It is assigned that the court erred in giving the first paragraph of the instructions, because the same is inconsistent with the ninth paragraph, for which reason it is alleged the

charge was misleading and prejudicial. The first paragraph of the instructions follows:

"You are instructed that a street railway company is not bound to accept for transportation without an attendant one who, because of physical or mental disability, is unable to take care of himself. Yet if its servants do voluntarily accept such a person unattended, they should render to him such special care and assistance as his condition requires, in order that he may be safely transported; and this principle applies to persons who are known to be partially helpless on account of intoxication."

The ninth paragraph was given as follows:

"I instruct you that defendants would not have been justified under the evidence in refusing to accept the deceased as a passenger, nor was it their duty to place a guard or watch over him; but simply to use such care or caution for his safety as his conduct or appearance would indicate to a man of ordinary prudence to be necessary under the circumstances. The burden of proof is upon the plaintiff to establish such lack of care, and unless she has done so by a fair preponderance of the evidence, you must find for the defendant."

The first paragraph, it will be seen, is a fair statement of the law according to the authorities cited above, and is not erroneous. The ninth paragraph was requested by the appellants and was given as requested. The requested instruction, we think, was erroneous, not only because it improperly commented upon the facts in issue and invaded the province of the jury, but also because it stated an erroneous rule. The giving of this erroneous instruction at the request of appellants and favorable to them did not, however, constitute prejudicial and reversible error against appellants, although the instruction may have conflicted with other correct ones. *Tham v. Steeb Shipping Co.*, 39 Wash. 271, 81 Pac. 711.

Other instructions are criticized, and error is assigned upon them; but we think the charge as a whole contains a fair statement of the law applicable to the issues and facts, and we find no error therein. The judgment is affirmed.

RUDKIN, FULLERTON, MOUNT, and DUNBAR, JJ., concur.

CHADWICK, J., took no part.

[No. 7541. Decided December 15, 1908.]

S. J. STAMATY, *Respondent*, v. ATHOS PAPPADAMITRIU *et al.*, *Appellants*.[1]

PLEADING—ANSWER—TRIAL—SHIFTING BURDEN OF PROOF. In a action to recover money loaned, payable on demand, an answer admitting the receipt of the money for another specific purpose does not shift the burden of proof, or release the plaintiff from proving the obligation to pay upon demand.

SAME—ISSUE AND PROOF—FAILURE OF PROOF. In an action to recover money loaned, payable on demand, in which the court ruled that the burden of proof was upon the defendants to establish their affirmative defense that money admittedly received was paid upon a contract to purchase land which the plaintiff refused to carry out, a judgment for plaintiff cannot be sustained upon the theory of an action for money had and received, where the only evidence was that of the defendants substantiating their defense, there being no proof of an obligation to pay on demand or any offer to amend the complaint to conform to the proofs.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 13, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on contract. Reversed.

Baxter & Wilson, for appellants.

Cutts & Dorety, for respondent.

HADLEY, C. J.—This is an action to recover the sum of $500, alleged to have been loaned by the plaintiff to the defendants, for the benefit of the community existing between the latter. It is alleged that the defendants promised to pay back the sum to the plaintiff on demand. The answer denies the complaint, but affirmatively alleges that the $500 referred to in the complaint was paid to the defendants by the plaintiff as part of the purchase price of $2,000 for four acres of land, and that the plaintiff has refused to carry out the terms of the agreement. The plaintiff denies this affirmative state-

[1]Reported in 98 Pac. 613.

ment in the answer. The cause was tried by the court without a jury, and resulted in a judgment for the plaintiff for the $500, with interest. The defendants have appealed.

The issue tendered by the respondent was that he loaned the $500 to be paid back on demand, and although this was denied by the appellants, yet, inasmuch as the latter admitted the receipt of $500, but alleged that it was for another purpose, the court held that the burden was upon the appellants to show that the money was not received as a loan. We think the burden was properly upon the respondent to prove the allegations of his complaint. These allegations were denied, and that made proof in support of them necessary. The affirmative allegation of the answer was in effect a denial of the truth of the averments of the complaint. The statement that appellant had received at the hands of respondent $500 for the particularly specified purpose in no sense tended to establish an obligation to return it on demand, which was the fact that respondent undertook to prove when he called the appellants into court.

Following the court's view as to the order of proof, the appellants opened the case with the introduction of their testimony, and at the conclusion thereof the respondent offered no testimony, but moved for judgment in his favor, which was granted. The testimony submitted by appellants all negatived the theory of a loan, and supported the view that the money was paid upon a contract to purchase land, which respondent afterwards refused to carry out. There was, therefore, no testimony whatever in support of the theory of the complaint that the money was loaned to be paid back on demand, and that a demand for payment had for that reason been made.

It is the theory of respondent that the action may be treated as one for money had and received; but the respondent offered no proof which would justify the court in treating the complaint as amended to conform to such an issue as arising from the evidence. The appellants moved for a new trial

on the ground, among others, that the evidence was insufficient to justify the judgment. We think the motion should have been granted on this ground. Without regard to the order of proof adopted by the court, we think the judgment must be reversed for the other reason stated. The cause having been tried by the court, we should probably not find the matter of the order of proof prejudicial to the extent of constituting reversible error within itself, if the evidence of both parties had been fully placed before the court. We do think, however, that the judgment cannot be sustained in the absence of any proof to support the issue as tendered by the complaint. It is therefore reversed, and the cause remanded with instructions to grant the motion for a new trial.

FULLERTON, CROW, and DUNBAR, JJ., concur.

[No. 7325. Decided December 18, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES FILLPOT, *Appellant*.[1]

HOMICIDE—MURDER IN THE FIRST DEGREE—INDICTMENT—DUPLICITY—STATUTES—CONSTRUCTION. Under Bal. Code, § 7035, making it murder in the first degree to kill another purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, an information is not bad for duplicity in alleging, in the language of the statute, a killing, purposely and of deliberate and premeditated malice and while engaged in the perpetration and attempt to perpetrate the crimes of robbery and burglary; in view of Bal. Code, § 6800, abolishing all forms of pleading, and § 6850, providing that no information shall be deemed insufficient if the crime is set forth in ordinary language in such a manner that a person of ordinary understanding may know what was intended.

SAME—INFORMATION—DEFINITENESS. Under Bal. Code, § 7035, making it murder in the first degree to kill another while in the perpetration or attempt to perpetrate a rape, arson, robbery, burglary, etc., it is not necessary to state the details of the acts included

[1]Reported in 98 Pac. 659.

in the crimes of robbery and burglary alleged, but it is sufficient to allege the perpetration or attempt to commit any of the included crimes in the language of the statute.

SAME—EVIDENCE—OF VENUE—SUFFICIENCY. Where there was circumstantial evidence sufficient to justify the jury in finding that the deceased, who was last seen alive in Spokane county, had been killed in that county and his body thrown into a river forming the boundary line and had floated down and lodged on the other side of the river, in Stevens county, the fact that the body was found in Stevens county would not show want of jurisdiction in the superior court of Spokane county, or that the crime had been committed in Stevens county.

CRIMINAL LAW—EVIDENCE—EXHIBITS—SAMPLES OF HANDWRITING—GENUINENESS—COMPETENCY. Where the accused denied the writing of a note tacked upon the cabin of the deceased the morning after he was last seen alive, samples of the accused's handwriting, identified by competent evidence of their genuineness, are admissible in evidence as exhibits for comparison by experts, although the accused did not himself admit their genuineness on the stand.

CRIMINAL LAW—APPEAL—EXCEPTIONS. Error cannot be assigned on failing to grant a motion to view premises in a prosecution for a homicide, when the court delayed ruling "until later in the case," no exception was then taken, and the motion was not renewed, nor anything further done except the noting of an exception after the jury was instructed and had retired.

SAME. Error cannot be assigned upon instructions that were not properly excepted to.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered January 30, 1907, upon a trial and conviction of murder in the first degree. Affirmed.

John L. Wiley and *H. Maxwell Brooks*, for appellant.

R. M. Barnhart and *Fred C. Pugh* (*A. J. Laughon*, of counsel), for respondent.

CROW, J.—The defendant, Charles Fillpot, having been charged with murder in the first degree and convicted, judgment and sentence of death were entered, and he has appealed.

The appellant contends that the trial court erred, in denying his motion to quash the information, in permitting the

introduction of evidence, and in overruling his motion in arrest of judgment. The information charges as follows:

"Comes now the prosecuting attorney and charges said defendant as follows: That said defendant, Charles Fillpot, alias Charles Williams, alias Will Myers, alias Will Dodson, on or about the 28th day of March, A. D. 1906, in the county of Spokane and state of Washington, purposely and of his deliberate and premeditated malice and while engaged in the perpetration and attempt to perpetrate the crimes of robbery and burglary, killed N. M. Cole by then and there purposely and of his deliberate and premeditated malice, beating and mortally wounding said Cole in some way and manner to the prosecuting attorney unknown."

In support of the above assignments of error, upon which he seems to base his main reliance for a reversal, the appellant contends that the facts stated do not constitute the crime of murder in the first degree, or any other crime; that the allegations are obscure and indefinite, and that the information attempts to plead four distinct causes of action improperly joined, to wit: (1) The commission of murder in the first degree by premeditated killing and malice; (2) the commission of murder in the first degree by a killing in connection with the crimes of robbery and burglary without pleading the facts constituting the latter crimes; (3) the commission of robbery without pleading the facts constituting that crime; and (4) the commission of burglary without pleading the facts constituting that crime. Bal. Code, § 7035 (P. C. § 1554), defines murder in the first degree as follows:

"Every person who shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another, shall be deemed guilty of murder in the first degree, . . . "

The information not only charges the appellant with having killed N. M. Cole, purposely and of deliberate and premeditated malice, which would be murder in the first degree,

but also charges that he purposely killed Cole while he, the appellant, was engaged in the perpetration and attempt to perpetrate the crimes of robbery and burglary, which would also be murder in the first degree. The appellant concedes that proof of purposely killing while perpetrating or attempting to perpetrate the crimes of robbery and burglary without any evidence of premeditation or malice would sustain the charge of murder in the first degree, but insists, that the commission, or attempt to commit, the included crimes of robbery and burglary is made the basis of the charge of murder in the first degree in this case; that the clause of the information charging such included offenses is an important one, as it relieves the state from the necessity of proving premeditation and malice; that the state should therefore be required to fully plead all the facts constituting such included offenses; that the use of the language of the statute in pleading them is insufficient, and that the information is not only bad for duplicity under Bal. Code, §6844 (P. C. §2097), but that it is also otherwise insufficient in law.

In support of these contentions, appellant cites numerous authorities from other jurisdictions, based upon common law rules. We do not deem it necessary to discuss these citations, as the strict rules of common law pleading do not obtain in this state. In passing upon the sufficiency of this information, we must measure it by the requirements of our own statutes. By Bal. Code, § 6800 (P. C. § 2091), all forms of pleading in criminal actions heretofore existing are abolished in this state, while Bal. Code, § 6850 (P. C. § 2103), provides that an information shall be sufficient if it can be understood therefrom . . .

"(6) That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended, . . . "

In *State v. Day*, 4 Wash. 104, 29 Pac. 984, this court,

in passing on the sufficiency of an information, and in discussing these sections, said:

"The ancient forms and technicalities of the common law, which subserved no purpose except to embarrass and impede the administration of justice, have been wisely discarded, and we now have a system of criminal pleading which neither disregards any of the substantial rights of the accused, nor permits him to shield himself from just punishment by requiring the insertion in the indictment or information of allegations in nowise necessary to inform him of the 'nature and cause of the accusation against him,' but which under the old system were necessary to be alleged and proved, or an acquittal would result, though the fact of guilt were otherwise manifest. Under our statute an indictment or information is sufficient if it can be understood therefrom that the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

See, also, *State v. Womack*, 4 Wash. 19, 29 Pac. 939; *State v. Turner*, 10 Wash. 94, 38 Pac. 864.

Although the information in *State v. Day, supra*, which charged the crime of murder in the first degree, did not charge the defendant with purposely killing while engaged in the perpetration, or attempt to perpetrate, one or more of the included crimes mentioned in the statute, yet we think the liberal rules of pleading announced in the opinion of this court in that case should be applied when we come to a consideration of the sufficiency of the information now before us. It is apparent that it charges but one crime, that of murder in the first degree. While it is true that the statute specifies more than one way in which that crime may be committed, and although the information following its language alleges that the appellant killed N. M. Cole purposely and of his deliberate and premeditated malice, and while engaged in the perpetration or attempt to perpetrate the crimes of robbery and burglary, yet the act of killing as charged constitutes but a single offense. The informa-

tion is not bad for duplicity. *State v. Adams*, 41 Wash. 552, 83 Pac. 1108.

Neither is the information defective because it fails to set forth in detail acts constituting the included crimes of robbery and burglary. The appellant is charged with the crime of murder as defined by the statute, which, in addition to stating the common law elements of that crime, also states that a homicide committed while the accused is perpetrating, or attempting to perpetrate, certain felonies, two of which are robbery and burglary, shall also be murder in the first degree. The crimes of robbery and burglary and the term "attempt" are elsewhere defined in the criminal code. These words "robbery," "burglary," and "attempt," as used in the statute, Bal. Code, § 7035 (P. C. §1554), defining the substantive offense of murder in the first degree, have, therefore, a well-defined and legal meaning, and it is sufficient, in drawing an information charging murder in the first degree, to plead the perpetration or attempt to perpetrate such included crimes in the language of the statute, and when so drawn the information is certainly a sufficient compliance with the requirements of Bal. Code, § 6850 (P. C. § 2103), in that it enables a person of ordinary understanding to know what is intended. *State v. Levan*, 23 Wash. 547, 63 Pac. 202. In reading the information before us, it is impossible to see how the appellant could be misled, or how he could fail to understand the exact nature of the charge preferred against him. The motion to quash the information was properly denied.

The information charges appellant with the commission of the crime of murder in Spokane county, but the dead body of N. M. Cole was found in Stevens county. By reason of this fact, appellant further contends, in support of his motion in arrest of judgment, that the superior court of Spokane county was without jurisdiction, the state having failed to show that the crime was committed in Spokane county. Without entering upon a detailed discussion of the

evidence, which was circumstantial, it will be sufficient to state that Cole was last seen alive in Spokane county, near his home, located close to a river which was the boundary line between the two counties, and that there was evidence sufficient to justify the jury in finding that he had been killed in Spokane county, that his body had been thrown into the river, that it had floated down the stream to a point where it lodged among some sawlogs on the Stevens county side, and that it was found there some weeks later.

Appellant further contends that the trial court erred in overruling his objections to certain expressions used by the prosecuting attorney in making his opening statement to the jury. We fail to see anything prejudicial or improper in the statements of which complaint is made.

The trial court, over appellant's objection, admitted in evidence certain exhibits, which were samples of the appellant's handwriting, and were admitted for the purpose of comparison with the handwriting in plaintiff's exhibit "B," a brief note found tacked upon Cole's cabin door the morning after he was last seen alive, and which exhibit "B" the state contended had been written by appellant. The appellant now contends that the trial court erred in admitting these exhibits, insisting that their genuineness was neither admitted nor proven. An examination of the record shows that all the exhibits introduced as samples of appellant's handwriting were positively identified as such, appellant himself having previously admitted the genuineness of a portion of them to witnesses who testified to his statements, and it also appearing that he had written the others in the presence of witnesses who testified to that fact. The appellant did not offer himself as a witness and admit on the trial that the exhibits were in his handwriting, but it does not follow from that fact that their genuineness could not be proven by other competent evidence. Such proof was made, and it was therefore proper to admit them for comparison by experts with exhibit "B," the writing of which the appellant

had denied. *Moore v. Palmer*, 14 Wash. 134, 44 Pac. 142.

Appellant further contends that the trial court erred in failing, until the close of the trial, to pass upon his motion for a jury view of certain premises, concerning which evidence had been admitted, and then denying such motion. The record shows the following:

"Mr. Brooks (attorney for appellant): If the court pleases, it is nearing the closing hour and I move that we adjourn until this afternoon and I make a motion that the jury be taken to view these premises of the Fillpot and Graetz places, and also that the jury be taken to view the Cole ranch, the Gannon ranch, and that locality around the Nine Mile bridge. Mr. Barnhart (prosecuting attorney): Before that is done it ought to be shown there is some occasion for it, something to be gained by anything of that character. The Court: I will rule on this motion later in the case."

No exception was then taken to this action of the court. The trial continued for several days thereafter, but the motion was not again urged, nor was anything further said on the subject until after the jury had been instructed and had retired to deliberate on their verdict; then the appellant's attorney made the following statement:

"Mr. Brooks: I just ask that an exception be noted to the instructions offered by the defendant and not given by the court to the jury, and I further want to make an exception to the fact that the motion asking for a jury view was not given; was not denied in any way. I ask for an exception to that."

In the absence of a timely renewal of the motion and an adverse ruling thereon, and in view of the fact that the granting of the request rested largely within the discretion of the trial court, we find no merit in this contention. *State v. Hunter*, 18 Wash. 670, 52 Pac. 247.

Several assignments of error are based upon certain instructions given to the jury by the trial court. These instructions are not properly before us for consideration, as

no proper exceptions thereto were taken by the appellant.

Appellant also contends that the trial court erred in overruling his motion for a directed verdict at the close of the state's case, and in overruling his motion for a new trial. Under these assignments, he insists that the evidence was not sufficient to show the *corpus delicti* or to support the verdict of the jury. The evidence in this case, which is entirely circumstantial, is voluminous, covering over eight hundred pages of the record. It is impossible for us to fully state and discuss it within the scope of an opinion of reasonable length. We have carefully read and considered the entire record and conclude that the evidence is amply sufficient to sustain the verdict of conviction. In fact, it is so overwhelming and convincing that we fail to see how any other verdict could have been reached by the jury. After a careful and exhaustive examination of the entire record, and all assignments of error presented, we are convinced that the appellant has been accorded a fair trial, that he has been ably defended, and that the verdict of the jury should be sustained. The judgment is affirmed.

HADLEY, C. J., MOUNT, and DUNBAR, JJ., concur.

RUDKIN, FULLERTON, and CHADWICK, JJ., took no part.

[No. 7414. Decided December 18, 1908.]

E R. CLARK, *Respondent*, v. J. W. CROSS *et al.*, *Appellants*.[1]

PLEADING — OBJECTIONS TO COMPLAINT — WAIVER — AMENDMENT — ISSUES AND PROOF — VARIANCE. In an action for services rendered, the fact that exhibits referred to in the complaint did not in all particulars coincide with the allegations of the complaint, does not warrant a nonsuit, where there was no demurrer to the complaint nor motion for judgment on the pleadings, which will be considered amended to conform to the proof, if necessary.

[1]Reported in 98 Pac. 607.

questions of fact involved, the record convinces us that the facts found by the court were amply justified by the testimony.

The judgment is affirmed.

MOUNT, RUDKIN, and FULLERTON, JJ., concur.

HADLEY, C. J., CROW, and CHADWICK, JJ., took no part.

[No. 7688. Decided December 18, 1908.]

C. A. SNOWDEN *et al.*, *Respondents*, v. JAMES J. ANDERSON *et al.*, *Appellants*, PETER BRADY *et al.*, *Respondents*.[1]

JUDGMENTS—CONCLUSIVENESS—QUESTIONS THAT MIGHT HAVE BEEN LITIGATED—PARTITION—ACCOUNTING. A judgment in an action between co-tenants awarding to the defendants, after an accounting, an undivided one-half interest in the whole tract of thirty-two acres, upon the payment of a certain sum, which plaintiffs thereupon voluntarily received, is conclusive as to the defendants' right to sixteen acres in a subsequent action for a partition; and precludes the plaintiffs from claiming that a sale of ten acres of the tract, made by plaintiffs pending the first suit, was for the joint benefit of both parties, where the defendants had no notice of such sale, and the plaintiffs received the purchase price without accounting therefor in the original suit, or offer to do so until after action for partition; since that question might have been determined in the original suit.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 26, 1908, upon findings in favor of the plaintiffs, in an action for partition. Affirmed.

H. P. Burdick, *Hudson & Holt*, and *J. J. Anderson*, for appellants, contended that the judgment is *res judicata* only as to questions directly involved in the issue and not to any incidental or collateral matter, though it may have arisen and been passed upon. *Lewis & Nelson's Appeal*, 67 Pa. St.

[1]Reported in 98 Pac. 610.

153; *Lawrence v. Hunt*, 10 Wend. 81; *Sewall v. Robbins*, 139 Mass. 164; *Hawley v. Simons*, 102 Ill. 115; *Vaughan v. O'Brien*, 39 How. Prac. 515; *Sawyer v. Woodbury*, 7 Gray (Mass.) 499, 66 Am. Dec. 518; *Dutton v. Woodman*, 9 Cush. (Mass.) 255, 57 Am. Dec. 46; *Davis v. Seattle Nat. Bank*, 19 Wash. 65, 52 Pac. 526; *Dunsmuir v. Port Angeles Gas, W., El. L. & P. Co.*, 30 Wash. 586, 71 Pac. 9.

Fogg & Fogg, for respondents Snowden. The payment of the money into court was in the nature of a tender, and plaintiff was not bound to take it out, but having accepted it, his act is a termination of his right to further litigation. *Lyons v. Bain*, 1 Wash. Ter. 482; *State ex rel. Lippincott v. Spokane*, 44 Wash. 688, 87 Pac. 944; *Reiff v. Coulter*, 47 Wash. 678, 92 Pac. 436; *Lewis v. Lichty*, 3 Wash. 213, 28 Pac. 356, 28 Am. St. 25; *Cerf, Schloss & Co. v. Wallace*, 14 Wash. 249, 44 Pac. 264; *Winslow v. Baltimore & O. R. Co.*, 208 U. S. 59, 28 Sup. Ct. 190, 52 L. Ed. 388; *Portland Const. Co. v. O'Neil*, 24 Ore. 54, 32 Pac. 764; *Rouge v. Lafargue Bros. Co.*, 49 La. Ann. 998, 22 South. 190; *Cook v. McComb*, 98 Wis. 526, 74 N. W. 353; *McGrew v. Grayston*, 144 Ind. 165, 41 N. E. 1027; *Williams v. Williams*, 6 N. D. 269, 69 N. W. 47; *Williams v. Richards*, 152 Ind. 528, 53 N. E. 765; *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014. The cause of action which the appellants now urge was available to them at the former trial. *Sweeney v. Waterhouse & Co.*, 43 Wash. 613, 86 Pac. 946; *Collins v. Gleason*, 47 Wash. 62, 91 Pac. 566; *Carmean v. North American Transp. & Trad. Co.*, 45 Wash. 446, 88 Pac. 834; *Northern Pac. R. Co. v. Slaght*, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 739; *Sayward v. Thayer*, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137. The evidence was conclusive that Snowden was the owner of an undivided one-half of said 32 acres. *Bruce v. Foley*, 18 Wash. 96, 50 Pac. 935. The judgment is conclusive as to questions that might have been determined in the original case. *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Nesbit v. Riv-*

erside Independent District, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 563; *Sayward v. Thayer, supra; Cloud v. Lawrence*, 12 Wash. 163, 40 Pac. 741; *State ex rel. Abernathy v. Moss*, 13 Wash. 42, 42 Pac. 622, 43 Pac. 873; *Dennis v. Kass & Co.*, 13 Wash. 137, 42 Pac. 540; *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25; *State ex rel. Ledger Pub. Co. v. Gloyd*, 14 Wash. 5, 44 Pac. 103; *Isensee v. Austin*, 15 Wash. 352, 46 Pac. 394; *Smith v. Ormsby*, 20 Wash. 396, 55 Pac. 570, 72 Am. St. 110; *Spring Hill Irrigation Co. v. Lake Irrigation Co.*, 42 Wash. 379, 85 Pac. 6; *Sweeney v. Waterhouse & Co.*, 43 Wash. 613, 86 Pac. 946; *Reiff v. Coulter, supra; State ex rel. Cook v. Fairley*, 45 Wash. 52, 82 Pac. 1052; *Cuschner v. Longbehn*, 44 Wash. 546, 87 Pac. 817; *Collins v. Gleason, Carmean v. North American Transp. & Trad. Co., Northern Pac. R. Co. v. Slaght*, and *Sayward v. Thayer, supra.*

Boyle, Warburton, Quick & Brockway, for respondents Brady.

MOUNT, J.—This action was brought for the partition of certain real estate in Pierce county. The principal issue in the case was whether the whole tract of thirty-two acres should be partitioned, or only twenty-two acres thereof. Upon a trial, the court entered a decree setting off sixteen acres on the east side of the tract to the plaintiffs, ten acres on the west side to defendants Brady and wife, and six acres between these two tracts to defendants Anderson and wife. The defendants Anderson and wife have appealed from that decree.

The facts are as follows: This tract of thirty-two acres of land was purchased by appellant Anderson and respondent Snowden in the year 1904. About a year later, Anderson and wife, claiming to own the property, brought an action to quiet title in themselves. They succeeded in the court below, and Snowden and wife, defendants in that

action, thereupon appealed to this court, and the judgment of the lower court was reversed,

"and the cause remanded to the court below with directions to ascertain the amount the defendants should pay to make up their one-half of the purchase price and any other sums that plaintiffs may have paid on account of the common property, with interest from date of payment, and to enter a decree declaring the defendants the owners of an undivided one-half interest in the premises in controversy, upon the payment of the sums thus ascertained, within ten days from the date of the decree," etc. *Anderson v. Snowden*, 44 Wash. 274, 87 Pac. 356.

The decision in that case states the history of the case to that time. While that case was pending, the respondents Brady and wife, with knowledge of the claim of Snowden, purchased from Anderson and wife, for $2,000, ten acres which were awarded to Brady and wife in the decree in this case. Snowden had no knowledge of this purchase until long afterwards.

When the remittitur in *Anderson v. Snowden*, *supra*, went down to the lower court with the directions above stated, a trial was had on February 8, 1907, and an accounting made, and Snowden and wife were ordered to pay into court the sum of $3,004.83, for the use of Anderson and wife. That amount was paid as required, and Snowden and wife were adjudged to be the owners of an *undivided one-half interest in the thirty-two-acre tract of land.* Thereafter, on February 15, 1907, Anderson, the appellant, voluntarily took the whole of that sum from the clerk of the court and receipted therefor, in payment of one-half of the purchase price of the whole tract of land. . No further appeal was taken from that judgment. After the time for appeal therein had expired, the respondents Snowden and wife brought this action for partition, with the result first herein stated.

We are satisfied that the appellants are entitled to no relief on this appeal. When the case of *Anderson v. Snowden* was sent to the lower court for an accounting and an ac-

counting was there had and a decree rendered and Snowden accepted the proceeds thereof, he cannot now be heard to say that such decree is not binding upon him. That decree awarded Snowden an undivided one-half interest in thirty-two acres of land, and he was required to pay one-half the cost thereof. If the sale of ten acres of the land by Anderson to Brady was for the benefit of the joint tenants and used for their common benefit, the item of $2,000 obtained from Brady should have been taken into account at the accounting, and the quantity of land in controversy thus reduced to twenty-two acres, and respondents' payments reduced accordingly. As we understand the facts, appellants do not claim that the $2,000 was used for the common benefit of the joint tenants. It is conceded, as we understand the record, that Anderson sold ten acres of the land without notice to Snowden; received the money, viz., $2,000, and did not account therefor; that respondent was required to pay into court $3,004.83, being one-half of the original purchase price of the whole tract, and that Anderson received the money so deposited. It is true, Anderson offers in this case to return to Snowden $1,000, and demands a partition of twenty-two acres of land instead of thirty-two acres, but that offer comes too late. That question was, or should have been, determined in the original case. If error was committed there, such error cannot be reviewed now, because the judgment there is final as between the parties. *Spring Hill Irrigation Co. v. Lake Irrigation Co.*, 42 Wash. 379, 85 Pac. 6; *Sweeney v. Waterhouse & Co.*, 43 Wash. 613, 86 Pac. 946; *State ex rel. Cook v. Fairley*, 45 Wash. 52, 87 Pac. 1052; *Carmean v. North American Transp. & Trad. Co.*, 45 Wash. 446, 88 Pac. 834; *Collins v. Gleason*, 47 Wash. 62, 91 Pac. 566.

The judgment is therefore affirmed.

DUNBAR, RUDKIN, and FULLERTON, JJ., concur.

HADLEY, C. J., CROW, and CHADWICK, JJ., took no part.

[No. 7746. Decided December 18, 1908.]

THE STATE OF WASHINGTON, *on the Relation of Leonard Fowler et al., Plaintiff*, v. R. S. STEINER, *as Judge of the Superior Court for Chelan County, Respondent.*[1]

APPEAL—RECORD—STATEMENT OF FACTS—INSUFFICIENCY — SETTLEMENT—CORRECTION OF ERRORS—MANDAMUS. It is error for the trial court to strike out a proposed statement of facts because it is not deemed a proper statement, where it was filed in good faith in an attempt to comply with the statute; since the remedy of the adverse party is to propose amendments, or to require that defects be supplied; and mandamus lies to compel the trial judge to proceed with the settlement.

Application filed in the supreme court, November 11, 1908, for a writ of mandamus to compel a trial judge to settle a proposed statement of facts. Writ granted.

Bevington & Finch, for relators.

Reeves & Reeves, for respondent.

FULLERTON, J.—This is an application for a writ of mandamus. It appears from the record that four certain causes were at issue and pending for trial in the superior court of Chelan county, which the court consolidated for trial as one action. The parties thereupon stipulated in writing that the consolidated action should be submitted upon its merits at a day therein named, in the

"following manner to wit: Upon the pleadings now on file in said several causes of action, as consolidated in said suit No. 3, it being understood that the complaints filed by the several plaintiffs in each of said suits, is to be considered as evidence, and the answers, cross-complaint and interpleaders filed by Leonard Fowler and Mary B. Fowler his wife, are also to be considered as evidence, and the actions thus consolidated are to be submitted on the issues thus joined and the evidence thus submitted under this stipulation."

[1]Reported in 98 Pac. 609.

On the day named in the stipulation, the cause was tried in the manner agreed upon, whereupon the court determined the issues in favor of the plaintiffs and against the defendants, and thereafter rendered and entered judgment in accordance therewith. In this judgment as entered certain recitals were made which, if unexplained, tended to show that evidence other than that mentioned in the stipulation had been introduced at the trial and considered by the court. The defendants appealed from the judgment entered, and in due time thereafter filed with the clerk of the court and served upon the opposing party a proposed statement of facts. The defendants thereupon appeared and moved to strike from the record the proposed statement of facts on the ground, among others, that the proposed statement did not contain any matter proper to settle as a statement of fact in any cause. This motion the court granted, and the defendant applied for this writ.

The statute relating to the certification of statements of fact for the purpose of an appeal provides that a party desiring to have such a statement certified must prepare the same as proposed by him, file it in the cause, and serve a copy thereof on the adverse party, and written notice thereof on any other party who has appeared in the cause. Within ten days after such service, any party to the cause may file and serve on the proposing party any amendment which he may propose to the statement. Any party may then serve upon the others written notice that he will apply to the judge of the court before whom the cause is pending or was tried to have the statement settled and certified, at which time, or at such time as the hearing may be adjourned, the judge shall settle and certify the statement. It is further provided that, if no amendments to the statement be proposed, or if amendments be proposed which the other party accepts, the judge may settle the statement without notice to any other party. Bal. Code, § 5058 (P. C. § 675).

The procedure herein provided for, it will be noticed, does

not contemplate the practice of moving to strike the statement of facts merely because it does not conform to what the adverse party may deem a proper or correct statement. The remedy the statute gives him is the right to propose such amendments as will make the statement a proper and correct statement of the facts of the case, and in all ordinary cases this is the adverse party's sole remedy for a defective or imperfect statement. But it is equally plain that it was not the purpose of the statute to require the adverse party to furnish the entire or any considerable portion of the statement, and the appellant should not be permitted to compel him to do this either designedly, or by omissions made through inadvertence. If, therefore, there is a serious omission in the proposed statement, or if the proposed statement is not in a form the court may deem proper, the party proposing it should himself be required to supply the defect. But the proper practice to accomplish this end is not to strike the proposed statement. Such a practice will in most cases deprive the party of his right to perfect his appeal, and consequently deprive him of a substantial part of that remedial justice guaranteed by the constitution and laws of the state. The better practice is to give the party an opportunity to correct the defects and supply the omissions pointed out, and strike the statement only when he refuses to comply with the court's order. The statement should be stricken in the first instance only where it is manifest that the party proposing it has been guilty of bad faith or such gross negligence as will amount to bad faith: the remedy should not be invoked where there has been an attempt in good faith to comply with the statute.

In the case at bar, the court in his return does not deny the necessity of a statement of facts to properly present the case in this court; on the contrary, he states that he has been ready and willing at all times to certify to a proper statement of facts, and avers that he has not been requested to certify a proper statement and no proper statement of

facts has ever been presented to him for certification, or any proposed statement of facts other than the one of which a copy is attached to his return, being a copy of the applicant's proposed statement. But it is manifest on examining this statement that the party proposing it was endeavoring in good faith to comply with the statute. The proposed statement is evidently a literal transcript of the stenographer's notes of what transpired at the trial. It contains, it is true, much matter that has no place in a statement of facts, but since it contains matters that are material and was filed in good faith in an attempt to comply with the statute, it was sufficient to invoke the jurisdiction of the court, and the court, instead of striking it, should have required it to be amended in the particulars it was deemed faulty, and after amendment certified it as requested.

A writ of mandate will issue directing the lower court to vacate the order striking the proposed statement of facts, with instructions to proceed thereafter as indicated in this opinion.

RUDKIN, MOUNT, and CROW, JJ., concur.

[No. 7122. Decided December 19, 1908.]

ISAAC N. CURTLEY, *Respondent*, v. SECURITY SAVINGS SOCIETY, *Appellant*.[1]

EVIDENCE—OPINIONS OF EXPERTS—HYPOTHETICAL QUESTIONS—SUFFICIENCY. Upon an issue as to the cost of a proposed building, the plans and specifications for which had been lost, it is competent, after showing in a general way the character, size, design and details of the house intended to be built, to ask expert contractors to state the probable cost of its construction, where the hypothetical questions included substantially all the details of construction and the adverse party had an opportunity to call attention to any detail omitted.

DAMAGES—ATTORNEY'S FEES—VALUE—EVIDENCE—SUFFICIENCY. In an action for damages including a sum paid for attorney's services,

[1]Reported in 98 Pac. 667.

that the attorney had defended a former action for the plaintiff, and that plaintiff had paid him $100 for such services, is sufficient evidence of the value of the services to warrant the submission thereof to the jury.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered May 25, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages sustained by a vendee through false representations in a sale of real estate. Affirmed.

William E. Richardson and *P. C. Shine*, for appellant.

E. O. Connor, for respondent.

Crow, J.—This action has heretofore been before this court. A statement of the case and issues may be found in our former opinion, 46 Wash. 50, 89 Pac. 180. On a second trial a verdict and judgment were entered in favor of the plaintiff, Isaac N. Curtley, and the defendant, Security Savings Society, has appealed.

The appellant first contends that the trial court erred in overruling its objection to certain hypothetical questions propounded to two expert witnesses who testified on behalf of the respondent. It was shown by evidence of the respondent that the plans and specifications for the building, which was to have been erected for him by the Cook-Clarke Company, had been lost and could not be produced at the trial. Thereupon respondent drew a rough sketch of the floor plans, and testified in a general way to the character, size, and design of the house intended to be built, giving the details as well as he could recall the same. He then called two contractors and builders as expert witnesses, and after showing them the sketch and stating in hypothetical questions the character of the house to be built, asked them to state the probable cost of its construction in labor and materials, exclusive of any profit to the contractor. To this the appellant objected, contending that enough facts as to the

plans and construction were not stated in respondent's testimony or included in the hypothetical questions to enable the experts to form or express an intelligent opinion. No prejudicial error was committed in overruling this objection. The hypothetical questions substantially included all the details of the proposed construction as given by the respondent. The appellant had an opportunity for calling the attention of the court and counsel to any detail omitted, and was afterwards permitted to conduct a thorough cross-examination. While it might have been much more satisfactory to have presented the original plans and specifications to the experts, it was impossible to do so. The best evidence available was introduced for the purpose of proving the damages sustained by the Cook-Clarke Company, which respondent had been compelled to pay. This being so, we think appellant's objection to the hypothetical questions and to the evidence given by the experts was properly overruled, as any objection that might properly be made to their evidence affected its weight rather than its admissibility.

In *O'Keefe v. St. Francis' Church*, 59 Conn. 551, 22 Atl. 325, one Darling, an expert witness, was permitted over objection to testify what it was worth to build a certain church, and the supreme court of errors, in passing upon the admissibility of his testimony, said:

"Mr. Darling was a practical builder of experience and had examined the church in question, although refused admission to the interior. We cannot say that it was error to receive this evidence. The witness was competent to speak so far as his observation extended, and his evidence may have been of some value."

The respondent testified that he had paid his attorney the sum of $100 for defending the former action for damages prosecuted against him by the Cook-Clarke Company, but no other or further evidence was given as to the value of such services by either party. The appellant now contends that, in the absence of proof of value, the trial court erred

in submitting to the jury the question of such attorney's fees as an element of damages. It was shown that the action had been defended by the attorney on behalf of respondent, and that the fee had been paid. We think this was sufficient to authorize the court to submit to the jury the question as to what sum, if any, the respondent was entitled to recover as damages for attorney's fees paid.

All other assignments of error presented by the appellant were concluded against it by our former opinion, which has become the law of this case. The pleadings and proceedings show that the controlling issues, being questions of fact, were properly submitted to the jury, and that their verdict resolved those issues in favor of the respondent. The judgment is affirmed.

HADLEY, C. J., MOUNT, and DUNBAR, JJ., concur.

[No. 7454. Decided December 19, 1908.]

MARY JONES, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*, C. J. ERICKSON, *Defendant*.[1]

MUNICIPAL CORPORATIONS—STREETS — DEFECTIVE SIDEWALK — EVIDENCE—ADMISSIBILITY—APPEAL—HARMLESS ERROR. In an action for personal injuries sustained by a fall on a temporary sidewalk, alleged to have been constructed by a city contractor, it is not error to exclude evidence of a city inspector to the effect that the city had not put the walk in place; especially where he afterwards testified that he did not know who did place the same.

APPEAL—REVIEW—EVIDENCE—STRIKING. Error cannot be assigned on the admission of evidence that was stricken out under instructions to the jury to disregard the same.

MUNICIPAL CORPORATIONS—STREETS—DEFECTIVE SIDEWALK — CONDITION AFTER ACCIDENT—EVIDENCE—ADMISSIBILITY. In an action for injuries sustained on a sidewalk within one hour after midnight, evidence is admissible of the condition of the walk a few hours thereafter, just before daylight, and long before street cars commenced running or before there was any traffic on the street.

[1]Reported in 98 Pac. 743.

SAME—INTOXICATION OF COMPANIONS. In an action for injuries sustained on a temporary sidewalk, it is proper to exclude evidence of the intoxication of the persons accompanying the plaintiff.

SAME—NECESSITY OF REPAIRS. In such a case, testimony bearing upon the public necessity of the repairs under way is properly excluded.

TRIAL—INSTRUCTIONS—TESTIMONY AND EVIDENCE. It is not a valid objection to instructions that the word "testimony" was used in place of the word "evidence."

JUDGMENT—AGAINST ONE OF TWO PARTIES—MUNICIPAL CORPORATIONS—STREETS—LIABILITY OF CITY AFTER VERDICT FOR CONTRACTOR—JOINT TORT FEASORS—TRIAL—VERDICT—EFFECT. In an action against a city and its contractor for personal injuries sustained upon a temporary sidewalk, alleged to have been constructed by the contractor, the direction of a verdict in favor of the contractor, because of insufficiency of the evidence as against him, does not preclude a recovery against the city.

APPEAL—REVIEW—ERROR AS TO ONE JOINT TORT FEASOR. In an action against a city and its contractor for personal injuries sustained upon a temporary sidewalk, error in directing a verdict in favor of the contractor is not ground for the reversal of a judgment against the city.

MUNICIPAL CORPORATIONS—ACTIONS—CLAIMS—AS CONDITION PRECEDENT — REASONABLENESS OF REQUIREMENTS. It is an unreasonable requirement that a claimant for damages against a city shall state his residence for one year last past, in a claim to be filed with the city, as a condition precedent to action against the city, and hence one that the city has no power to enforce by ordinance.

APPEAL—REVIEW—NEW TRIAL—DISCRETION. The refusal of a new trial will not be disturbed on appeal where there was no abuse of discretion.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 18, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries. Affirmed.

Scott Calhoun and *James E. Bradford*, for appellant.
Morris, Southard & Shipley, for respondent.
Shank & Smith, for respondent Erickson.

DUNBAR, J.—The respondent recovered a judgment against appellant in the lower court for the sum of $1,500,

for damages alleged to have been sustained by her while attempting to walk over a temporary sidewalk placed upon the sidewalk area of one of the streets of Seattle, at which time said street was being regraded by the defendant Erickson, under contract with the city. The judgment was rendered upon a verdict of the jury, and this appeal is taken therefrom.

When the evidence was all in, defendant Erickson challenged its legal sufficiency, and moved the court for a directed verdict as to himself, and such motion was granted.

It is assigned that the court erred in sustaining objections to the following question asked witness Thompson on cross-examination, Thompson being at the time of the accident an inspector of the city: "Did you ever, on the 26th of July, 1906, or any other time prior thereto, order those two planks, or any other planks of any kind, character, or description, placed where counsel says these two planks were?" The objection was properly sustained, for two reasons: (1) It was not proper cross-examination, and (2) there was no allegation in the complaint nor contention on the part of the respondent that the temporary sidewalk was actually put in place by the city; but on the other hand, the allegation was that the same was constructed by and under the supervision of the contractor. The city's liability therefore did not arise from the original construction of the walk; and, in any event, the witness shortly after did testify over the objection of respondent that he did not know who did place the planks.

It is contended that the court erred in admitting the testimony of the witness Vallad in relation to the condition of the place of the accident subsequent thereto, viz., between eight and nine o'clock the next morning. Counsel in preparing his case on appeal has evidently overlooked the fact that the record shows (p. 19) that the court, in response to counsel's motion, instructed the jury. that all that part of the testimony of the witness with reference to changes

after the date of the accident would be stricken out, and that it should disregard the same.

It is also assigned that the court erred in not sustaining objections to the testimony of witnesses Dr. Crookall and Mr. Morris, in relation to the condition of the place at which the accident occurred, and which was objected to for the same reason that the objection above noted was made. These witnesses testified to the condition of the place at which the accident occurred as it appeared early the next morning. The accident occurred between twelve o'clock midnight and one o'clock a. m., and the time testified to by the witnesses was only a few hours thereafter the same morning, Mr. Morris testifying that it was long before the street cars commenced running, just towards daylight, and before there was any traffic on the street. The time testified to so closely followed the accident that we think the testimony was admissible.

The court did not err in rejecting the testimony offered for the purpose of showing that the parties who were accompanying the respondent the evening of the accident had been drinking liquor. Neither did the court err in excluding testimony bearing upon the question of the public necessity of tearing up the sidewalk, for this question was not an issue in the case; and even if it were, the court instructed the jury that the city had a right to improve its public thoroughfares even to the extent of making them more dangerous than under original conditions.

Counsel for appellant criticises the instructions of the court for the reason that the word "testimony" was used where it is alleged the word "evidence" should have been used. But this criticism we think is overtechnical. While it is true that some authorities define the words as technically different, making "evidence" the more comprehensive word, yet in common expression, even of courts, they are used synonymously, and we have no idea that the jury was misled by any accurate knowledge on its part of nice technical dis-

tinctions. This same question was considered by this court in *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548, and the contention now urged by appellant was held to be without merit.

Without further reviewing the numerous assignments of error, we think the instructions given fairly stated the law, and we are unable to perceive any error in the admission or rejection of testimony.

It is strenuously urged that, by reason of the court's sustaining a motion for a directed verdict on the part of the contractor and codefendant Erickson, no judgment can be sustained against the city, under the rule announced in *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649. But an examination of the opinion in that case shows that there is no similarity in principle between the two cases. In the *Doremus* case, under the allegations of the complaint, the negligence of the servant for which the master was responsible was the only ground upon which the master could have been held responsible. Here no such issues are presented. It is contended by the appellant that the court erred in dismissing the contractor Erickson from the case, because the testimony in relation to his negligence was conflicting and should therefore have been submitted to the jury. Upon this question we do not now pass, for even conceding that the court did err in that particular, it would be no ground for disturbing the judgment rightly obtained by respondent against the city, for the city was primarily responsible to the respondent. Nor do we at this time indicate whether the city would have redress against the contractor Erickson in an independent action. Those are questions which cannot affect the rights of the respondent.

It is also contended that the court erred in admitting in evidence the respondent's notice and claim, as not complying with the ordinance requiring a statement of the residence of the claimant for a year prior to the accident. This requirement was held to be unreasonable by this court in *Hase v. Seattle*, *ante* p. 174, 98 Pac. 370. But the statement

in this case goes much further towards a strict compliance with the ordinance than did the statement in the *Hase* case, *supra*. There the residence was not given at all, but here the statement is, "that during the time herein mentioned and long prior thereto, she was a resident of Seattle, King county, Washington." The notice was properly admitted.

We are not prepared to say that the court abused its discretion in not granting a new trial on the showing made. On the whole record, we find no reversible error, and the judgment is therefore affirmed.

CROW, MOUNT, RUDKIN, and FULLERTON, JJ., concur.

[No. 7481. Decided December 19, 1908.]

W. H. B. THOMAS, *Respondent*, v. W. N. FOS, *Appellant*.[1]

WITNESSES—CALLING ADVERSE PARTY—REBUTTAL. Bal. Code, §§ 6008, 6012, expressly authorize the examination of the adverse party as a witness, and the rebuttal of his evidence by adverse testimony, although he was called as the party's own witness at the opening of the trial.

APPEAL — REVIEW — HARMLESS ERROR—TRIAL — INSTRUCTIONS — STATEMENTS OF COUNSEL. It is not prejudicial error for the court to instruct that the jury are not to consider statements of counsel as evidence "unless it corresponds with your memory of the evidence as you heard the witness detail it," where the jury had been instructed that the case must be decided upon the testimony detailed upon the witness stand, and could not have been misled.

TRIAL—ARGUMENT OF COUNSEL—REPLY. It is not prejudicial error to fail to restrict the reply argument of counsel to matters already commented on, where the court in ruling upon the objection stated that if the rules were transgressed he would give an opportunity to reply, and no request was made for leave to answer.

DISCOVERY—SUBPOENA DUCES TECUM—FAILURE TO PRODUCE PAPERS —PRESUMPTION—QUESTION FOR JURY. The failure of a party to produce evidence within his possession, in compliance with a subpoena

[1]Reported in 98 Pac. 663.

duces tecum, raises the presumption that they are what the adverse party claims them to be; and it is proper to so instruct the jury, and to instruct that it is for the jury to determine whether he complied with the subpoena.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 15, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover for services rendered. Affirmed.

Will H. Thompson, for appellant.
Charles M. Baxter, for respondent.

HADLEY, C. J.—This is an action to recover the sum of $1,535, alleged to be due to the plaintiff from the defendant as commission for assisting to make sales of various pieces of real estate. The plaintiff alleged that he was employed by the defendant for the purpose of listing property for sale, and also to assist in selling property so listed with the defendant in connection with the latter's real estate business; that, by the terms of the employment, the defendant promised to pay to the plaintiff twenty per cent of all profits and all commissions received by the defendant from the sale of any and all property so listed by the plaintiff, and thirty-three per cent of all profits and commissions received by the defendant from the sales of any property listed with the defendant when the plaintiff assisted in making the sales. The defendant denied the existence of the above arrangement, and the cause was tried before a jury, resulting in a verdict for the plaintiff in the sum of $360. Judgment was entered for the amount of the verdict, and the defendant has appealed.

It is assigned that the court erred in permitting the respondent to contradict the evidence of his own witness, and of similar effect is another assignment of error that the respondent was permitted to introduce evidence of contradictory statements made by his own witness out of court. The witness referred to was the defendant in the case, the ap-

pellant here. He was called by the respondent at the opening of the trial, and was interrogated concerning the arrangement between himself and the respondent. As an adverse party, the respondent had the right to call appellant to testify, under our statute, Bal. Code, § 6008 (P. C. § 968), which is as follows:

"A party to an action or proceeding may be examined as a witness, at the instance of the adverse party, or of one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify at the trial, or he may be examined on a commission."

Section 6012 of the same chapter of Bal. Code (P. C. § 972), also provides as follows:

"The testimony of a party, upon examination at the trial, or by deposition, or upon interrogatories filed, may be rebutted by adverse testimony."

As we view the statute, there is barely room for interpretation. Its terms are so explicitly and plainly stated that we find it difficult to make an argument upon it. Respondent had the undoubted right under the statute to rebut the testimony of appellant, an adverse party, by adverse testimony, notwithstanding the fact the witness had been called to the stand by respondent. *Denny v. Sayward*, 10 Wash. 422, 39 Pac. 119; *Sawdey v. Spokane Falls & N. R. Co.*, 30 Wash. 349, 70 Pac. 972, 94 Am. St. 880.

In the last-cited case the court said:

"Answers to interrogatories are in the nature of admissions. While the party calling for them may put them in evidence for the admissions they contain, he is no more bound by their statements against his interest than he is bound by the statements of a witness he may call, and who may testify in part against his interest. He can still introduce evidence contradictory of such statements, and leave it to the jury to determine wherein the truth lies. Moreover, the right to contradict answers to interrogatories, though introduced by the party calling for them, is expressly granted by statute. Bal. Code, § 6012 (P. C. § 972)."

Inasmuch as the statute applies the same rule to a witness examined either at the trial or upon interrogatories, it will be seen that the effect of what the court said as quoted above was to pass directly upon the question raised here. We think, without regard to the authorities cited by appellant from other jurisdictions, our statute governs the question here, and inasmuch as the same statute was long since interpreted against appellant's contention, it must be so held now.

It is urged that it was error to use the following words in an instruction to the jury:

"Statements made by counsel in arguments to the court upon the evidence or arguments to you as to what the evidence is are not to be considered as evidence by you, unless it corresponds with your memory of the evidence as you heard the witness detail it."

Appellant's argument is that the above authorized the jury to consider the statements of counsel as evidence. The phraseology is slightly indefinite, but it was expressly said that statements of counsel are *not* to be considered as evidence. The phrase following "unless it corresponds with your memory of the evidence as you heard the witness detail it," had the effect, taken together with the previous phrase, of giving the impression to the ordinary mind that the jury should not even regard statements of counsel as to what they claimed the evidence to be unless the jurors so remembered it. The court had just told the jury that "the case must be decided upon the testimony which has been detailed upon the witness stand." We think, considering the whole context, that the jury could not have been misled by any such interpretation of the instruction as is now urged by appellant.

It is next assigned that the court erred in permitting respondent's counsel, in the closing argument to the jury, to state that certain receipts given in evidence had in fact been signed by respondent in blank, leaving blank places for the

date, name, and amount. It is contended that the purpose of counsel in making the argument was to leave the impression with the jury that appellant had been guilty of forgery in filling up receipts after they had been signed, and attempting to bind respondent without his consent by the insertion of matter unknown to him; whereas, it is insisted that no such testimony had been given in the case. We think there was such testimony in the record as warranted some comment along the lines indicated; but counsel insists that, as the comment had not been made before the reply argument, he had no opportunity to answer it. At the time appellant's counsel objected to the argument, the court instructed the jury and addressed counsel as follows:

"Gentlemen of the jury, you understand you are the judges of what the testimony is, and unless counsel's statement of the testimony agrees with your memory of what the testimony is you are not to consider what counsel says. It is not for the court to tell you what the testimony is; it is for you to determine that. It is a difficult matter to confine counsel to a reply argument. I will say this, however, that if Mr. Baxter's argument, after his argument is closed, if I think he has transgressed the rules the court has laid down I will give you an opportunity to reply, Mr. Thompson."

The record does not disclose any subsequent application by appellant's counsel for leave to answer this part of respondent's argument, and under such circumstances we think there was no reversible error.

A subpoena *duces tecum* was issued to appellant, requiring him to bring into court all written instruments and papers connected with the transaction. On this subject the court instructed the jury as follows:

"It is claimed by the defendant that he has produced all the documents which he has touching matters in controversy in this case. It is for you to determine from the evidence whether he has complied with this subpoena or not; and if you find from the evidence that the defendant has complied with the subpoena and has produced all of the written instruments and papers connected with the transactions men-

tioned in the complaint and in the answer, then of course no penalty is to be suffered by him at this trial. But if you should find from the evidence that he has failed, neglected or refused to bring into court all the instruments and papers connected with the transactions mentioned in plaintiff's complaint and mentioned in the answer to this case, which he had in his possession and under his control at the time this subpoena was served upon him, the 8th day of January, 1908, then the law will presume, it will be your duty to presume, that such instruments which he failed to produce, are such as the plaintiff claims them to be."

The instruction does not assume that any evidence was in fact withheld, but leaves the jury to find if such was the fact, and then states what the rule is, if they so find. We think the statement of the rule is substantially supported by the following and cases there cited:

"From the failure of a party to produce evidence within his control, and which it is his duty to produce, a presumption or inference arises that if the evidence were produced it would be unfavorable to him; and this rule has been applied equally in criminal as in civil cases. The principle is frequently applied in cases in which documentary evidence is withheld by a party, especially where the party has had notice to produce documents in his possession; and it has been held that the rule applies fully where the party withholding a document is a corporation. The enactment of statutory provisions to compel a party to produce documentary evidence in his possession does not prevent unfavorable inferences or presumptions from the refusal of a party to produce such evidence. No unfavorable presumption can arise from the withholding of documents if such documents would not be admissible in evidence in favor of the party claiming advantage of the presumption; and it has been held that unless the party desiring the production of documentary evidence gives notice to the party in whose possession it is to produce it, no unfavorable presumption or inference can arise from its nonproduction." 22 Am. & Eng. Ency. Law (2d ed.), pp. 1257, 1258.

We find no reversible error, and the judgment is affirmed.

FULLERTON, MOUNT, CROW, and DUNBAR, JJ., concur.

them to respectively affect the several respondents. Assuming, without deciding, that the action should be treated as one in equity, that fact does not relieve appellants from observing the orderly rules of pleading. Our statute, Bal. Code, § 4942 (P. C. § 412), provides that several causes of action may be united in the same complaint, but they "must be separately stated." The motions of the respondents asked that the statute be observed in this respect. The respondents were entitled to have these separate statements so that they could severally demur or answer to them in an orderly way, and frame the issues in a clear and definite manner. The court could not do otherwise than grant the motions, and its judgment must be affirmed.

FULLERTON, RUDKIN, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7505. Decided December 19, 1908.]

HERMAN TAGGE, *Appellant*, v. THE CITY OF ROSLYN, *Respondent*.[1]

MUNICIPAL CORPORATIONS — STREETS — EXCAVATIONS—BARRIERS—SUFFICIENCY. Where a trench in an alley extending across a sidewalk was to be guarded simply over night, barriers are sufficient, as a matter of law, where a one-by-six board was nailed three or four feet above the walk to the corner of a building, two or three feet distant from the trench, and to a post at the outer edge of the sidewalk, with a ten-penny nail at each end of the board, and beneath the board a two by twelve plank, four feet long, was laid against the house and a similar one against the post and a third plank laid horizontally across the two, the place being well lighted by arc lights in the street on either side 150 feet distant from the alley, besides other lights from the building reflecting on the sidewalk.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered January 29, 1908, in favor of the defendant by direction of the court, at the close of a jury trial, in an action for personal injuries. Affirmed.

[1]Reported in 98 Pac. 668.

Pruyn & Felkner, for appellant.

W. J. Welsh and *Eugene E. Wager*, for respondent.

RUDKIN, J.—This was an action to recover damages for personal injuries. At the close of all the testimony the court directed a judgment in favor of the defendant, from which the plaintiff has appealed.

The material facts are as follows: First street, in the city of Roslyn, runs in an easterly and westerly direction, and an alley twenty feet in width runs in a northerly and southerly direction through the center of one of the blocks on the southerly side of the street. The Halstead house is situated on one side of this alley, and the Roslyn hotel on the opposite side. The sidewalk in front of the Halstead house on First street forms the floor of the porch of the hotel, and the covering of the porch is supported by posts at the outer edge of the sidewalk, which is about eight feet in width. On the 31st day of May, 1907, the city excavated a trench through this alley for sewer purposes. The trench was about two feet wide and three or four feet deep, and was excavated two or three feet from the Halstead house. The trench extended across the sidewalk and two or three feet into the adjacent street.

When the city employees quit work on the evening of the above date, they placed barriers around this trench on the side next to the Halstead house in the manner following: A one-by-six board was nailed to the corner of the house on the inner side of the sidewalk, and to the post supporting the porch at the outer side, about three or four feet above the walk, with a ten-penny nail in each end of the board. Beneath this board a piece of two-by-twelve plank, about four feet in length, was laid up against the house on one side, a similar plank was laid against the post at the other side, and a third plank was laid horizontally across these two.

There was an arc light at the intersection of First street with the two cross streets at either side of this alley, each light being about 150 feet distant from the excavation in the alley

and the barricades surrounding it. In addition to these lights, electric lights burned at all hours of the night in the offices of the two hotels on the alley, reflecting on the sidewalk in front of the buildings. The barricades surrounding this excavation were seen in place by different witnesses between the hours of nine and ten o'clock that night, and could be readily seen at a considerable distance from the excavation. Up to this point, there was no sufficient conflict in the testimony to leave any question of fact for the jury to pass upon. About 11:30 o'clock on the night in question, as he was returning to his home, the appellant passed along the sidewalk in front of the Halstead house and fell into the excavation, receiving certain injuries, for which a recovery is sought in this action.

There was testimony tending to show that the appellant was badly intoxicated at the time, but this was denied by the appellant, and that question, as well as the question of contributory negligence in general, was for the jury. The appellant testified that he did not see the excavation, nor were there any barriers surrounding it to his knowledge. Another witness testified that he passed along the sidewalk between ten and eleven o'clock that night, and that there were no barriers there to his knowledge. On the morning of the following day, one end of the board nailed across the walk was still nailed to the building, but the other end was down in the excavation, and the planking placed beneath the board was lying on the sidewalk. There is no claim that the city had knowledge before the accident that the barriers had been removed, nor is there any claim that the barriers had been displaced or removed for a sufficient length of time prior to the accident to require the submission of the question of implied or constructive notice to the jury.

The sole question in the case is, therefore, were the barriers placed around the excavation sufficient as a matter of law, or should the question of their sufficiency have been submitted to the jury as a matter of fact. Considering the nature of the excavation and the temporary character of the bar-

riers placed around it, they having been placed there simply to guard the excavation over night, we feel constrained to hold that the court did not err in holding that the barriers were legally sufficient, and in directing a judgment in favor of the city. In *Welsh v. Lansing*, 111 Mich. 589, 70 N. W. 129, the court said:

"No claim is made that a barrier consisting of a plank laid upon barrels, completely fencing in a shallow excavation made for temporary purposes, is not a reasonable one, and, if there were, we should be inclined to say that it was sufficient, as matter of law, in a case like this, and that it should not be left to the jury to say that it was not, under ordinary circumstances."

In this case we think that the same reasoning and the same rule should apply.

The judgment is therefore affirmed.

FULLERTON, CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 7417. Decided December 23, 1908.]

ARCHIE VON POSTEL, *a Minor, by His Guardian, etc., Respondent*, v. LAKE SAMMAMISH SHINGLE COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—NATURE AND CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. A recovery for injuries sustained by a boy while attempting to operate a band saw is not precluded by the fact that he could not explain how he came in contact with the saw, where it appears that he was but seventeen years of age, wholly without experience, and had been set to work without proper instructions, and was doing his work as best he could.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 22, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by an operator of a band saw. Affirmed.

[1]Reported in 98 Pac. 665.

McClure & McClure, for appellant, contended that there was no evidence as to how the accident happened, and it was therefore error to submit the question of negligence to the jury. *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Stone v. Crewdson*, 44 Wash. 691, 87 Pac. 945; *Gardner v. Porter*, 45 Wash. 158, 88 Pac. 121; *Peterson v. Union Iron Works*, 48 Wash. 505, 93 Pac. 1077; *Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 729; *Mountain Copper Co. v. Van Buren*, 123 Fed. 61; *Brady v. Western Union Telegraph Co.*, 113 Fed. 909; *Duntley v. Inman*, 42 Ore. 384, 70 Pac. 529, 59 L. R. A. 785; *Philadelphia & Reading R. Co. v. Schertle*, 97 Pa. St. 450; *Patton v. Texas & Pac. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Lindall v. Bode*, 72 Cal. 245, 13 Pac. 660, *Baulec v. New York etc. R. Co.*, 59 N. Y. 356; *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 9 South. 566.

Dudley G. Wooten, for respondent, cited: *Barrett v. Banner Shingle Co.*, 45 Wash. 12, 87 Pac. 919; *Stark v. Port Blakely Mill Co.*, 44 Wash. 309, 87 Pac. 339; *Kirby v. Wheeler-Osgood Co.*, 42 Wash. 610, 85 Pac. 62; *Jancko v. West Coast Mfg. & Inv. Co.*, 34 Wash. 556, 76 Pac. 78; *Id.*, 40 Wash. 230, 82 Pac. 284; *Donald v. Ballard*, 34 Wash. 576, 76 Pac. 80; *Boyer v. Northern Pac. Coal Co.*, 27 Wash. 707, 68 Pac. 348; *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184; *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 31 L. R. A. 855, *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820.

RUDKIN, J.—On the 3d day of December, 1906, the plaintiff was employed by the defendant to work in and about its shingle mill, on Lake Sammamish, in King county,

and commenced work on the following morning. During the forenoon of the first day, he assisted in gathering up shingle bolts on the lake, and during the afternoon carried wood from the mill to the home of the manager. On the second day he assisted in piling and counting shingles until late in the afternoon, and then operated a band saw used in sawing bands for shingles for a short time. On the morning of the third day, he again attempted to operate the band saw, and had been engaged in that work but a few minutes when his hand came in contact with the saw, causing injuries for which a recovery was sought in this action. From a judgment in favor of the plaintiff, the defendant has appealed. The only errors assigned are based on the insufficiency of the evidence to sustain the judgment.

At the time of receiving the injuries complained of, the respondent was a few days under the age of seventeen years. He had no prior experience in working in mills, and knew nothing whatever about the management or operation of band saws, or any other kind of machinery. He did not know where to stand while operating the saw, and was so awkward and inexperienced in his work that his first act was to tip the slide or table from the saw frame onto the floor. According to his testimony he received no instructions as to the safe and proper method to operate the saw, and no warning against the dangers incident to such operation; and according to the testimony of the appellant, the instructions given were meager and wholly inadequate.

It is not contended that the evidence was insufficient to establish negligence on the part of the appellant in placing an inexperienced boy at work in a dangerous place without proper and adequate instructions to insure his safety. Indeed, the testimony was ample in that regard, and the negligence on the part of the appellant might well be characterized as gross and inexcusable. Nor is it contended that the respondent was guilty of contributory negligence as a matter of law. The sole contention is that the evidence failed to show

just how the accident happened, and that therefore there was nothing to submit to the jury or to warrant a verdict in favor of the respondent. According to the testimony of the respondent, he was attempting to operate the saw as best he knew how, at the time he received his injury; and while he candidly admitted that he did not know just how or why the accident occurred, when we consider his inexperience and the case and deplorable frequency with which such accidents happen, it is not at all surprising that the unfortunate victim should not always be able to explain in detail the exact cause of the accident. If he knew and was able to explain how he came in contact with the saw after the accident, he could in all probability have avoided the accident in the first instance. As said by this court in *Wikstrom v. Preston Mill Co.*, 48 Wash. 164, 93 Pac. 213, "the danger from voluntary contact with the saw is not the only danger to guard against. There is also the danger from involuntary contact brought about from the improper use of the saw"; and where the contact is involuntary or accidental, the ability of the party to fully explain how the accident happened should not be deemed conclusive against him.

When the jury in this case found, under proper instructions, that the failure on the part of the appellant to properly instruct the respondent in the use of the saw, or to warn him against danger, was the direct and proximate cause of his injury, they but voiced a conclusion which followed naturally, if not inexorably, from the facts and circumstances in the case. The conclusion here announced is supported by the decision of this court in *Kirby v. Wheeler-Osgood Co.*, 42 Wash. 610, 85 Pac. 62. The appellant relies chiefly on the case of *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457. It must be conceded that the two cases have many points in common, but in the case at bar there was less room for speculation as to the cause of the accident, the respondent was less experienced and less fully instructed,

and without attempting to distinguish the cases further, we will only add that we are not inclined to extend the rule there announced.

Finding no error in the record, the judgment is affirmed.

HADLEY, C. J., FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7590. Decided December 24, 1908.]

E. R. ANDERSON, *Respondent*, v. C. E. MITCHELL, *Appellant*.[1]

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—BILLS AND NOTES. In the absence of fraud or mistake, parol evidence is inadmissible to show that the maker of a note signed the same for a corporation under a collateral verbal agreement that he should not be liable thereon either as principal or surety.

PLEADING—ISSUES AND PROOF—BILLS AND NOTES. Under an affirmative answer that the maker of a note was not to be bound either as principal or surety, evidence to show the nature of the debt under the laws respecting community property and suretyships is not within the issues.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 8, 1908, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a promissory note. Affirmed.

John C. Kleber, for appellant.

Happy & Hindman, for respondent.

CHADWICK, J.—Action by E. R. Anderson, plaintiff, against C. E. Mitchell, defendant, upon a promissory note. From a judgment in favor of plaintiff, defendant appeals.

The note sued on was made by appellant in favor of the Fidelity National Bank of Spokane, Washington. After maturity of the note, it was transferred to respondent, who

[1]Reported in 98 Pac. 751.

brought this action. The complaint is in the usual form. Appellant answered, admitting the execution of the note, and alleging as a further defense that the debt, loan or consideration for the note was due to the bank from the United States Marble Company, a corporation; that the said Marble Company was a heavy debtor of the bank, and desired further advances in excess of the amount permitted by the Federal laws and regulations governing national banks, and that the bank was desirous of loaning the money to said company, but did not desire the note of said company, but requested the appellant herein to make the note for the said Marble Company; that it was understood and agreed by and between the said bank and the appellant when said note was executed and delivered that appellant should not be bound thereby, either as principal or surety. A demurrer to this answer was overruled and the case proceeded to trial. However, on the trial the court refused to allow the introduction of parol evidence in support of the further and separate defense, and we think properly so.

It has been repeatedly held by this court that, in the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability. He is bound by the terms of his obligation. *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977; *Bryan v. Duff*, 12 Wash. 233, 40 Pac. 936, 50 Am. St. 889; *Allen v. Chambers*, 13 Wash. 327, 43 Pac. 57; *Wingate v. Blalock*, 15 Wash. 44, 45 Pac. 663; *Shuey v. Adair*, 18 Wash. 188, 51 Pac. 388, 63 Am. St. 879, 39 L. R. A. 473; *Hemrich v. Wist*, 19 Wash. 516, 53 Pac. 710. This being the rule as between the original parties to the instrument, it follows that the defense could not be set up as against a subsequent holder of the note.

It is contended, however, that under the community property laws and the statutes respecting suretyships, the maker has a right "to establish the nature of the debt created by the note." Appellant expressly pleads that he was not to

be bound either as principal or surety, nor is there anything in the record to indicate that appellant is a married man or possessed of any community property. It will thus be seen that the question raised in appellant's brief, and sought to be raised by him on the trial, is not within the issues, and consequently cannot be inquired into by this court. A party cannot plead one defense and give evidence of another over the objection of his adversary.

HADLEY, C. J., MOUNT, RUDKIN, FULLERTON, CROW, and DUNBAR, JJ., concur.

[No. 7694. Decided December 24, 1908.]

H. S. SPEDDEN *et al.*, *Respondents*, v. A. E. SYKES *et al.*, *Appellants*.[1]

APPEAL—BRIEFS—ASSIGNMENT OF ERRORS—SUFFICIENCY. While errors not pointed out with reasonable clearness will not be considered, a brief will not be struck for failure to assign errors, where the alleged errors are set forth with the pages of the record showing the various rulings, and rule eight is substantially complied with.

APPEAL—BRIEFS—TIME FOR FILING—DISMISSAL. A motion to dismiss an appeal for failure to file briefs in time will be determined by the status of the case at the time the motion is heard.

VENDOR AND PURCHASER—RESCISSION BY VENDOR—OPTION—FORFEITURE OF PAYMENTS—EXECUTION OF OPTION—ACCEPTANCE OF MORTGAGE. The forfeiture of preliminary payments under an optional contract for the purchase of land, of which time is of the essence, are waived by the execution of a deed and the acceptance of notes secured by a mortgage, pursuant to a clause of the option agreement providing therefor, even though the mortgage was insufficient in form, where there was no fraud and no intervening rights of third parties, and the parties were proceeding in good faith to carry out the contract; since the option may be considered executed, and forfeitures are not favored.

[1]Reported in 98 Pac. 752.

MORTGAGES—VALIDITY—FORM. Insufficiency in the form of a mortgage does not affect its validity as between the parties.

VENDOR AND PURCHASER—RESCISSION BY VENDOR—WAIVER OF FORFEITURE. The forfeiture of payments made under a contract for the purchase of land cannot be claimed by a vendor seeking rescission after acceptance of notes secured by an informal or insufficient mortgage, where no demand was made for a formally executed mortgage.

MORTGAGES—VALIDITY—FORM. A mortgage is not void merely because it fails to state the amount of the debt which it was given to secure.

Appeal from a judgment of the superior court for Stevens county, Chapman, J., entered December 10, 1907, upon findings in favor of the plaintiffs, in an action by vendors for the rescission of a contract to purchase land. Reversed.

L. H. Prather, for appellants.
Judson & Rochford, for respondents.

CHADWICK, J.—Respondents have moved the court that this appeal be dismissed, for the reasons (1) that appellants' brief contains no assignments of error, and (2) that the briefs were not filed within time. To sustain the first ground *Haugh v. Tacoma*, 12 Wash. 386, 41 Pac. 173, 43 Pac. 37, is relied upon. This case has been distinguished in the later cases of *Johnston v. Gerry*, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503, and *Crowley v. McDonough*, 30 Wash. 57, 70 Pac. 261; and upon the authority of these cases the first ground of the motion is not well taken. It has also been held that a motion to dismiss an appeal for failure to file briefs in time must be determined by the status of the case at the time the motion is heard. *Skagit R. & Lumber Co. v. Cole*, 1 Wash. 330, 26 Pac. 535. The motion to dismiss the appeal is denied.

From the pleadings and findings of fact, it appears that, on the 9th day of April, 1906, the parties entered into a written contract whereby defendant Sykes was given an option to purchase certain mining claims, together with all plaintiffs' interest in certain other property, situate in Stevens county,

Washington. Upon the execution of the contract, defendant paid the sum of $5,000. The contract provided for the payment of the further sums of $7,500 on or before October 1, 1906, and $7,500 on or before April 1, 1907, and that a deed should be executed upon the demand of the defendant, provided that upon delivery of the deed defendant would execute a note for the unpaid balance, together with a mortgage upon the property conveyed. It was also agreed that,

"If in any event said party of the second part, his successors or assigns, shall fail to make the payments as herein provided, then this contract may be forfeited at the option of the parties of the first part, and upon the exercise of such option the party of the second part, his successors or assigns, shall forfeit to said parties of the first part any and all sums paid hereunder, which said sums it is hereby agreed shall be considered liquidated damages for such breach, and thereupon the said parties of the first part shall be entitled to the immediate possession of the said premises above described."

Defendant went into possession of the property under the terms of his option, and at some time prior to October 6, 1906, at his request, plaintiffs conveyed all of the property described in the contract to the defendant Chewelah Copper Queen Mining Company. On September 17, 1906, the defendant mining company executed and delivered to plaintiffs its two promissory notes for the sum of $7,500 each, the one due October 1, 1906, and the other April 1, 1907. At the same time, and for the purpose of securing the payment of the said notes according to their tenor and effect, the defendant mining company made and delivered to plaintiffs a mortgage in form as follows:

"*This Indenture Witnesseth*, That the mortgagor, Chewelah Copper Queen Mining Company, of the town of Chewelah, in the county of Stevens, and state of Washington, mortgages and warrants to H. S. Spedden, Eugene Spedden, E. M. Spedden, C. C. Bunker and B. J. Bunker, of the town of Chewelah, county of Stevens, and state of Washington, to secure the payment of two promissory notes executed by Chewelah Copper Queen Mining Company, bearing even date

herewith, payable to the order of H. S. Spedden, Eugene Spedden, E. M. Spedden, C. C. Bunker and B. J. Bunker, the following described real estate, to wit, the Copper Queen, Baby S., Hillside, Northview, Copper Chief, Millsite and Copper Crown, all being situated in the Chewelah mining district, Stevens county, Washington; and also their interest in and to the northwest quarter of the southeast quarter and the southwest quarter of the northeast quarter of section twenty-nine (29) in township thirty-three (33) north of range forty-one (41) E. W. M., situated in the county of Stevens, in the state of Washington, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this state.

"Dated this 17th day of September, A. D. 1906.

"CHEWELAH COPPER QUEEN MINING CO. (Seal)

"By THOS. D. SCHALL, President,

"J. H. S. GIFFORD, Secretary.

"State of Minnesota, County of Hennepin—ss.

"I, A. D. Smith, in and for said county in the state aforesaid, do hereby certify that Thos. D. Schall, president, and J. H. S. Gifford, secretary, for the Chewelah Copper Queen Mining Company, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this 20th day of September, 1906, in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

"Given under my hand and seal this 20th day of September, A. D. 1906.

"(Notarial Seal) "A. D. SMITH,

"Notary Public, Hennepin County, Minnesota."

Plaintiffs received the mortgage and placed it of record, believing, as they say, that it was a "mortgage in fact, sufficient in form under the laws of the state of Washington to create a lien upon the property therein described, to secure the payment of the two promissory notes, each for the sum of $7,500, at the time in each note stated." It is also alleged in the complaint that the deed to the defendant company was procured and the mortgage received by plaintiffs because of the fraudulent representations of the defendants,

in that plaintiffs being ignorant of the ways of business were induced to believe the mortgage was "a mortgage in truth and in fact, whereas said pretended mortgage was at the time of its delivery, and now is, worthless under the laws of the state of Washington." All of this is denied by defendants, and the trial court found that there was no fraudulent intent. The promissory notes were not paid at the time stipulated, and this action was brought for the cancellation of the deed and forfeiture of the rights of the defendants under the option contract. From a decree in favor of plaintiffs, the defendants have appealed.

The case is thus reduced to an action for the forfeiture of an option agreement for the purchase of land. Under well settled principles of the law, a vendor may reserve the right to forfeit the contract and retain the amounts paid by the vendee on the purchase price. If this were all there was to this case, its solution would involve no effort. But where, not only under the contract but by subsequent agreement of the parties, notes are given for the payment of the purchase price, which in the absence of any agreement to the contrary would extend the time of payment over the period of limitation fixed by the statute for recovery upon overdue contracts, thus eliminating the implication or express understanding, as the case may be, that time is the essence of the contract, a more difficult question is presented, for it is upon this theory that forfeitures are sustained. 1 Pomeroy's Equity, § 445; *Clark v. Lyons*, 25 Ill. 105; *Shafer v. Niver*, 9 Mich. 253; *Linscott v. Buck*, 33 Me. 530.

While appellants undoubtedly had the right to reserve the remedy of forfeiture, it may be seriously questioned whether they have not waived it by accepting the promissory notes of the mining company. The contract ceased to be executory and became an executed one. This theory is consistent with the express terms of the contract. It was agreed,

"By and between the parties hereto that at any time the party of the second part may desire the conveyance of said

property the said parties of the first part will convey the same to him, or to his successors and assigns, by a good and sufficient mining deed free and clear of all liens and incumbrances accruing prior to the date hereof; providing, that upon the delivery of said deed in accordance herewith the said party of the second part, his successors or assigns, will execute a note to the parties of the first part for the amount remaining unpaid under terms hereof when the request for such deed shall be made, secured by a mortgage upon the above described property."

This court has held the general doctrine that forfeitures are not favored in the law, and that courts should promptly seize upon any circumstance arising out of the contract or relations of the parties that would indicate an election or an agreement to waive the harsh and at times unjust remedy of forfeiture, a remedy which is oftentimes too freely granted by those who have taken no account of the misfortunes and disappointments which conditions, unforeseen and beyond a party's control, have raised as a bar to performance, however honest may be his intent. *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026. Equity will enforce forfeitures when it is the contract of the parties that it shall be so. But before making its decree it will consider every agreement, every declaration, and every relation of the parties arising out of the contract; and if there be anything that warrants a finding that the parties have resolved anew, it will so decree.

But it is insisted that the mortgage tendered and received by the plaintiffs was void and of no effect. It is true that the mortgage does not literally comply with the form suggested by the legislature of this state (Bal. Code, § 4522; P. C. § 4454), and its acknowledgment is informal; but we do not understand that courts should be overtechnical in construing the acts of original parties to a contract. The trial court expressly found,

"That the said defendants did not, at any time, make to the said plaintiffs any false or fraudulent representations as to the validity of said purported mortgage and said notes, or any or either of them."

The parties proceeded in equal good faith to carry out their contract. The one has tendered and the other received a mortgage insufficient in form to meet the accepted definitions of the term. No rights of third parties have intervened, and it must be admitted that the instrument is the acknowledgment of an obligation and an agreement that certain property shall be held to satisfy the debt whatever it may be. Is it any less a mortgage, as between the parties, than one drawn with all the forms and sanctions of the law? We think not. Admitting its lack of form, it was susceptible of being reformed in a court of equity. The appellant mining company could not have denied its intent and obligation. *Commercial Nat. Bank v. Johnson*, 16 Wash. 536, 48 Pac. 267; *Land Mtg. Bank v. Nicholson*, 24 Wash. 258, 64 Pac. 156.

If all these things were not true, there is another principle that precludes a recovery in this case; and that is that it was the privilege, and we may say the duty, of respondents to demand a more formally executed mortgage, if they so desired, at the time the one under consideration was tendered. It is no answer to this proposition to say that appellants were ignorant and unskilled in matters of business, and were overreached by respondents. That allegation fell with the finding that there was no fraud. Having accepted the mortgage, they are bound, in the absence of intervening rights, to rely upon it, for it carries with it a right of redemption in appellants which is valuable to them and cannot be defeated without proper proceedings and a day in court.

From the record it is clear that the court below held the mortgage void because it did not state the amount of the debt, and that the mortgage was not executed by the corporation nor acknowledged by the corporation or its officers. The first ground is untenable. Jones, Mortgages (6th ed.), § 64; *Robinson v. Williams*, 22 N. Y. 380; 27 Cyc. 1056. The second ground needs no further discussion. The hold-

ing of the court is that the complaint in this case does not state a cause of action, and that the conclusions of law are not warranted by the facts found.

The case will be reversed, and remanded with instructions to the lower court to dismiss this action without prejudice to the right of respondents to bring an action to foreclose their mortgage upon the property.

RUDKIN, FULLERTON, CROW, and DUNBAR, JJ., concur.

HADLEY, C. J., and MOUNT, J., took no part.

[No. 7614. Decided December 26, 1908.]

G. C. SMART *et al.*, *Appellants*, v. A. BURQUOIN, *Respondent*.[1]

PLEADING—REPLY—DEPARTURE. In an action to recover upon a *quantum meruit* for services rendered in plowing defendant's land, it is a departure in pleading to allege, in reply to an answer setting up a lease, that plaintiffs were in possession as tenants of the defendant at the time of the plowing, and that defendant afterwards breached the terms of the lease by serving notice upon plaintiffs to quit and taking possession of the land.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 27, 1908, in favor of the defendant by direction of the court, after a trial before the court and a jury, in an action on contract. Affirmed.

Lovell & Hamilton, *E. A. Davis*, and *John Truax*, for appellants.

Roche & Onstine, for respondent.

CHADWICK, J.—This was an action brought by plaintiffs, G. C. Smart et al., to recover the reasonable value of work and labor performed by them at the special instance and request of defendant, A. Burquoin, in plowing certain lands owned by defendant, in Adams county, Washington. Defendant asked for a bill of particulars in respect to the

[1]Reported in 98 Pac. 666.

contract, whether oral or written, to which the plaintiffs responded, saying "that the agreement, if any, made by and between the parties herein, was oral and not in writing."

Thereupon defendant answered, denying the material allegations of plaintiffs' complaint, and further alleging that plaintiffs had entered into possession of defendant's lands under an express contract of lease, made in the presence of witnesses, dictated by an attorney to a stenographer, but for reasons not now material not extended and signed by the parties at the time. The alleged lease is set out *in haec verba* in the answer. It is further alleged that, in virtue of the contract of lease, plaintiffs did partially cultivate and summer fallow the lands of defendant; that plaintiffs violated the terms of the lease in certain specified particulars and had wholly abandoned the land.

To defendant's answer plaintiffs replied, admitting that the parties had entered into an oral contract by the terms of which defendant agreed to lease, and plaintiffs agreed to rent, for a certain term, the lands described in defendant's answer, the rental therefor to be one-third of the crops raised thereon; that they went into possession under the terms of the oral agreement, and that they remained in possession until served with a notice to quit. They deny further that they have in any way broken or violated the terms of the lease, but alleged that, on the contrary, defendant has violated the terms of the contract by entering upon and taking possession of the lands during the life of the lease. The parties disagree upon the terms of the contract with reference to certain covenants going to the seeding and cultivation of the land; but, as will be seen, this element of the case presented needs no discussion.

It is admitted that the contract, whether as alleged by plaintiffs or as alleged by defendant, was made on or about the 1st day of March, 1906, and that plaintiffs entered and continued in possession until on or about January 7, 1907, which was the date that service of notice to quit was made

upon them. The work done by plaintiffs was performed between those dates, and consisted in summer fallowing a part of the land. When the case was called for trial, defendant objected to the introduction of any evidence, and moved the court that the jury be discharged and that judgment be entered for the defendant for the reason "that there was a departure in the pleadings, the reply being inconsistent with the complaint." This motion was overruled, which being duly excepted to, the court and a jury proceeded to hear the evidence. When plaintiffs had rested, defendant renewed his motion and further challenged the sufficiency of the evidence, and moved that the jury be discharged and judgment entered in favor of defendant. From the allowance of this motion, and the judgment of the court dismissing the action, plaintiffs appeal.

A careful reading of the transcript impels the conclusion that no error was committed by the court in thus disposing of the case. He might well have, and as we view the law should have, sustained respondent's objection to the introduction of any testimony on the part of appellants, for clearly there was a departure in the pleadings. It can hardly be denied that the reply sets up a cause of action different from that alleged in the complaint. It enlarges the ground upon which the recovery was originally sought, and if proven would entitle appellants to recover damages for the value of their leasehold estate, rather than the value of services which they had expressly contracted to perform. The true test of departure is whether evidence of facts alleged in the reply could be received under the allegations of the complaint. 6 Ency. Plead. and Prac., p. 462. This test brings this case squarely within the rule announced in the cases of *Osten v. Winehill*, 10 Wash. 333, 38 Pac. 1123, and *Distler v. Dabney*, 3 Wash. 200, 28 Pac. 335. In the last case cited the court said:

"But in this instance the matters and things set up in the reply are inconsistent with the statement made in the com-

plaint; for the cause of action stated in the complaint is money had and received by defendant for the use of plaintiff, while the cause of action stated in the reply is the breach of a specific contract. To allow the plaintiff to prove his case on the averments of either the complaint or reply, . . . as the testimony happens to serve, would be to allow him to go fishing for a judgment; while the defendant would be uncertain what he was called upon to defend until the testimony of plaintiff had been submitted."

In this case the pleadings show that appellants seek to recover upon a *quantum meruit* the value of their plowing, while holding under a lease with the rent reserved in kind, with no promise or obligation whatever upon the respondent to pay in money for any work done in tilling the land. Therefore, whether they abandoned or quit upon notice becomes immaterial. If they abandoned, they are without remedy; if they were evicted, they have mistaken their remedy. There was no question for the jury to decide.

The judgment of the lower court is affirmed.

RUDKIN, FULLERTON, and MOUNT, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

DUNBAR, J., concurs in the result.

[No. 7360. Decided December 26, 1908.]

GREGORIE FRAZEE *et al.*, *Respondents*, v. J. J. PIPER, *Appellant*.[1]

APPEAL—PRESERVATION OF GROUNDS—DEMURRER—WAIVER OF OBJECTIONS. A demurrer to a complaint on various grounds, submitted without argument or affording the trial judge opportunity to pass upon the objections, cannot be urged in the supreme court except upon the ground that there was no jurisdiction.

INDIANS—ACTIONS—PARTIES — LEGAL CAPACITY TO SUE — EJECTMENT. Indians holding title to lands under a patent subject to a restriction on alienation for a period of twenty-five years, which will then ripen into a fee simple, have the legal capacity to maintain an action of ejectment to recover possession of the lands, without making the United States a party.

SAME—COURTS—JURISDICTION. The state courts have jurisdiction of such an action.

PUBLIC LANDS—PATENTS—INDIANS—RESTRICTION AGAINST ALIENATION—WHAT LAW GOVERNS. Where an Indian made a settlement upon public lands under the act of 1875, which would have entitled him to a patent with a restriction against alienation for five years, but was not entitled to and did not make final proof until after the passage of the act of 1884, his patent should be issued under the act of 1884 with restrictions against alienation for twenty-five years.

INDIANS — CONTRACTS — LANDS — CONVEYANCE — RESTRICTIONS AGAINST ALIENATION. A deed by an Indian holding land under a patent with restrictions against the power of alienation is void.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 18, 1907, upon findings in favor of the plaintiffs, in an action of ejectment, after a trial before the court without a jury. Affirmed.

Belt & Powell, for appellant.

Danson & Williams (Fred H. Moore, of counsel), for respondents.

[1]Reported in 98 Pac. 760.

CROW, J.—This action was commenced by Gregorie Frazee and Mary Frazee, his wife, against J. J. Piper and others, to recover possession of real estate in Spokane county. Judgment being entered in their favor, the defendant J. J. Piper has appealed.

The respondents alleged that they are Indians, formerly members of the Spokane tribe; that, previous to entering upon the land in controversy, they severed their tribal relations and never resumed the same; that on March 6, 1883, they settled on one hundred and sixty acres of public land in Spokane county; that on May 31, 1890, they made final proof; that on December 11, 1891, they received a patent issued to Gregorie Frazee; that their final proof was made, and they were entitled to a patent under the act of Congress of July 4, 1884, entitled, "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1885, and for other purposes"; and particularly under that paragraph thereof reading as follows:

"That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian,

or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever" (3 Fed. Stats. Ann., p. 491);

that the executive officers of the United States in fact issued a patent under the provisions of an act of Congress of January 18, 1881, relating to transactions with the Winnebago Indians of Wisconsin; that the patent, which was afterwards duly recorded, contained the following provisions:

"This patent is issued upon the express condition that the title hereby conveyed shall not be subject to the alienation or incumbrance either by voluntary conveyance or by judgment, decree or order of any court, or subject to taxation of any character, but shall remain inalienable and not subject to taxation for the period of twenty years from the date hereof, as provided by the act of Congress approved January 18, 1881";

that by reason of the foregoing facts, the real estate has thus far been at all times inalienable; that in 1892 the appellant, J. J. Piper, wrongfully took possession thereof; that he has at all times since withheld the same from respondents, and that the rental value during such time has been $2,800.

The appellant, after denying certain allegations of the complaint, affirmatively alleged, that the respondents settled upon the land and made final proof under the act of March 3, 1875, entitled, "An act making appropriations to supply deficiencies in the appropriations for fiscal years ending June 30, 1875, and prior years, and for other purposes," section 15, of which reads as follows:

"That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled, 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not

be held to apply to entries made under this act: *Provided, however*, That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor" (3 Fed. Stats. Ann., p. 490);

that the patent should have been issued thereunder; that it should have contained the above provision of nonalienation for five years; that on April 19, 1897, after the five years' limitation had expired, the respondents, by written contract of sale, conveyed the land to the appellant Piper; that respondents placed him in possession; that he made payment of the purchase price; and that he is entitled to have his title and possession quieted. By the reply, the respondents denied these allegations, and alleged that they had no knowledge of the execution of the alleged contract; that if at any time they did execute the same, its contents were not explained to them; that it was misrepresented to them, and that its execution was procured by fraud.

The trial court in substance found, that the respondents' patent should have been issued under the act of July 4, 1884; that in the spring of 1897 the appellant entered upon the land; that he has at all times since retained possession; that it had a rental value of $165 per annum; that the respondents are Indians, unable to speak the English language, except a very few words thereof; that in April, 1887, they signed a writing which purported to confer some rights upon Piper; that neither of respondents understood that it was thereby intended to convey to the appellant any title, either then or at any future time; that neither of them was aware that the writing was intended for any other purpose than to give the appellant a lease for a period not exceeding six years; that the respondent Mary Frazee was not advised of the contents of the instrument except that she was told by her husband Gregorie Frazee that the land was leased for six years, and that the appellant paid the respondents the

consideration named in the agreement, the payments being made in small installments at various times; that the respondents at all times understood the payments were for rent; that when the writing was signed by respondents there was no one present who could speak the Indian language; that the respondents were not represented by any person who was looking after their interests, and that the only explanation of the writing made to them was attempted by one Palmer, who spoke to them partly in English and partly in jargon and by motions and signs which they were unable to understand.

The appellant insists that the trial court erred in overruling his special and general demurrer to the complaint. By the demurrer he contended, (1) that the court had no jurisdiction of the subject-matter of the action; (2) that the respondents have no legal capacity to sue; (3) that there is a defect of parties; and (4) that the complaint does not state facts sufficient to constitute a cause of action. The record shows that the demurrer was submitted without argument. This being true, the trial judge was not afforded an opportunity for passing upon the contentions now made by appellant, and he is in no position to urge the same on this appeal, except upon the question of want of jurisdiction, or to show that the complaint when aided by the evidence fails to state a cause of action. In support of his contention that the court had no jurisdiction of the subject-matter of the action, he insists that the respondents, being Indians, are wards of the government which held the land in trust for them, and that they have no legal capacity to sue. There is no question but that, under the act of 1884 and the authority of the United States, the respondents were entitled to possession of the land, and that no third party would have a right to wrongfully interfere therewith. Should such an interference occur, they would certainly have the legal capacity to prosecute an action against the wrongdoer for the purpose of recovering or protecting such rightful possession.

The right of Indians to sue in both the Federal and state courts is well established. 16 Am. & Eng. Ency. Law (2d ed.), 216; 22 Cyc. 116.

The record shows that the respondents in this action are the same parties who were plaintiffs in *Frazee v. Spokane County*, reported in 29 Wash. 278, 69 Pac. 779; that the land here involved is the identical land there involved, and that J. J. Piper, the appellant in this action, was the moving spirit who promoted and successfully prosecuted that action in the names of Frazee and wife, for the purpose of enjoining Spokane county from taxing the land. Appellant caused that action to be prosecuted by the present respondents, as he then supposed, for his own benefit, and during its progress no question was raised as to the right or capacity of the Indians to sue. Yet the appellant now contends that the respondents cannot sue; that the United States as trustee holding the title is a necessary party either as plaintiff or, not consenting to act as plaintiff, then as defendant under Bal. Code, § 4833 (P. C. § 262), and that the superior court had no jurisdiction of the action to which the United States is not a party, prosecuted by the Indians alone. This is an action in ejectment against appellant, the party in possession. In *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318, an action in ejectment, it was held that the party in possession is the only necessary party defendant, and we now hold that the respondents, although Indians, were entitled to commence and prosecute this action alone and in their own names, to recover their rightful possession. Their interest in the land, although subject to restrictions on alienation for a period of twenty-five years from the date of their patent, is such that, by lapse of time, it will ripen into a full and complete fee simple title, and is one under which they are entitled to present and exclusive possession of the land as against all the world. Such an interest is certainly as high an order of title as that which in *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9, we held to be in the nature of a

base or qualified fee, and is of sufficient value and rank to enable the respondents to prosecute this action for possession. In further support of the proposition that the state courts have jurisdiction to entertain this action, see the cases of *Pierce v. Frace*, 2 Wash. 81, 26 Pac. 192, 807; *McHenry v. Nygaard*, 72 Minn. 2, 74 N. W. 1106; *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576, 91 Am. St. 825. In the case last mentioned it was held that an entryman under the homestead laws of the United States, in possession of the land selected, although he had not made final proof, might maintain an action for damages for injuries to the land. The demurrer to the complaint was properly overruled.

Upon the merits, the controlling questions presented by the appellant's further assignments of error are, (1) under what act should the patent have been issued, and what conditions should it have contained; (2) does the evidence admitted sustain the findings of the trial court that the written contract under which appellant claims was improperly obtained from the respondents, and is therefore void. By the pleadings both appellant and respondents contend that the patent actually issued was improperly issued, as it contained conditions provided for in the act of 1881 pertaining to the Winnebago Indians of Wisconsin. This court, in *Frazee v. Spokane County*, *supra*, held that the patent should have been issued under the act of July 4, 1884, and we now adhere to that holding, which sustains respondents' present contention. The appellant, however, now insists that the final proof was made under the act of 1875; that the patent should have only contained a restriction of five years on the right of alienation, and that, said period having expired prior to the execution of the written contract of sale under which he claims, such contract should be specifically enforced in this action.

When Gregorie Frazee filed upon the land in 1883 the act of 1875 was in effect; but before he made or was entitled to make final proof, the act of July 4, 1884, became

a law, and the question now before us is whether his patent should have been issued under the terms of the former act of 1875, or the later act of 1884. We think the trial court, following *Frazee v. Spokane County*, correctly held that the latter act applied. Had Gregorie Frazee's right to the homestead been perfected under the act of 1875, and had he been entitled to make final proof under that act before the act of 1884 was passed, a different condition would be presented, and the five years' restriction on his right of alienation, for which the act of 1875 provided, would not have been extended by the act of 1884. His right of homestead, however, was not perfected, nor was he entitled to make final proof for several years after the act of 1884 took effect. This being true, we conclude that his patent when issued should have contained the restriction on alienation for twenty-five years, as provided in the later act of 1884; that he actually took the land subject to such restriction, and that the attempted contract of sale made to the appellant within that period was void. In 1888 the attorney general of the United States, in passing on this identical question, said:

"I am of the opinion that this act of 1884 was intended to be supplemental to and somewhat in modification of the act of 1875, and that its provisions apply to all entries made under the act of 1875 for which patents had not issued at the time the act of 1884 went into effect." Opinions of Attorneys General, vol. 19, p. 166.

As the restriction upon respondents' right of alienation must continue for twenty-five years from the date of the patent, it necessarily follows that the contract upon which appellant relies conveyed no rights and cannot be enforced. In any event, we conclude from a careful examination of all the evidence, that the contract was not understood by either of the respondents at the date of its alleged execution, that its terms were not explained to them, and that they understood they were leasing the land for a period of not to exceed six years. The evidence shows that the ap-

pellant claims to have purchased the land on April 19, 1897, for $1,600; payable, $200 in cash, $800 in four annual installments of $200 each, and $600, the final installment, on March 20, 1902; that none of the deferred payments bore interest; that he himself at the time valued the land at $1,500; that he continued in possession for ten years under his written contract of sale without the payment of interest or taxes; that he charged to the respondents, as payment on the purchase money, about $150 of the expense of conducting the case of *Fraxee v. Spokane County*, and that the rental value of the land was $165 per annum. The trial court, in entering final judgment, taking into consideration the rental value of the land for ten years, the payments, and certain small improvements made by the appellant, refused to enter any money judgment, other than one for costs, in favor of either party. We find no prejudicial error in the record. The judgment is affirmed.

HADLEY, C. J., MOUNT, and DUNBAR, JJ., concur.

FULLERTON, RUDKIN, and CHADWICK, JJ., took no part.

[No. 7400. Decided December 26, 1908.]

C. E. LAWSON, *Appellant*, v. C. W. SPRAGUE, *Respondent*.[1]

VENDOR AND PURCHASER—ASSIGNEE OF CONTRACT—DEFAULT IN PAYMENT—CONTRACTS—AMBIGUITY. The assignee of an option to purchase land is not, by reason of failure in tendering payments, in default to the extent of rendering him liable to the assignor for the price agreed between them, where the option contract is ambiguous, stating in one place that $30,000 was the full purchase price, and in another requiring payments aggregating $38,000, in the absence of an explanation of the ambiguity or price.

PRINCIPAL AND AGENT—CONTRACTS—AUTHORITY OF AGENT—PLEADING. A complaint in an action upon an assignment of a contract to purchase land, alleged and set out as signed by the defendant, by "R. G. F. his agent," is insufficient to state a cause of action for the

[1]Reported in 98 Pac. 737.

money agreed to be paid in consideration of the assignment, when there is no allegation that the agent named was defendant's agent, or that he acted for defendant or had authority or intended to do so.

VENDOR AND PURCHASER—ASSIGNEE OF CONTRACT—DEFAULT IN PAYMENT—DEFECT IN TITLE—PLEADING—LEGAL CONCLUSIONS. Where the vendor was not in position to convey property by a "good and sufficient title," by reason of the fact that part of the land was shore land belonging to the state, an assignee of the contract, under obligation to pay for the assignment upon the consummation of the deal, is not in default by reason of failing to tender the price, since a tender would have been unavailing; and a complaint by the assignor showing the defect in the title is not aided by pleading the contrary legal conclusion that defendant agreed to accept the title as exhibited, the contract set out calling for a good title.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 14, 1908, in favor of the defendant, dismissing an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

Flueck & Bebb, for appellant.

Hastings & Stedman, for respondent.

HADLEY, C. J.—This is an action to recover the sum of $5,500 from the defendant. The cause was determined below on demurrer to the complaint. The demurrer alleged, among other things, that the averments of the complaint are insufficient to constitute a cause of action against the defendant. The demurrer was sustained and, for want of further pleading, the action was dismissed. The plaintiff has appealed.

The material contents of the complaint, as briefly stated as practicable, are as follows: It is alleged that on September 12, 1906, the appellant became possessed of a valuable right, which was evidenced by a written instrument of that date as follows:

"Received from C. E. Lawson the sum of $1,000 (one thousand dollars) to apply on contract for the purchase price of lots 7, 8, 9, 10, 11 and 12, Blk. 105, D. T. Denny's 1st Add. to No. Seattle, Washington. The full purchase

price of said property to be $30,000, payable as follows: Fifteen thousand dollars cash in hand on delivery of title (including the amount of this receipt) and the balance. Purchaser to assume that $8,000 Mtg. running one and two years from last March at 6 per cent. and give second mortgage and notes as follows: Lots 7, $3,000; 8, $2,000; 9, $2,000; 10, $2,000; 11, $3,000, and 12, $3,000, payable in one and two years from date at 7 per cent. interest equal amounts, with interest on deferred payments at 7 per cent. per annum until paid. The said purchaser shall be furnished a complete abstract showing good and sufficient title to said property, and be allowed ten days for examination thereof; whereupon he agrees to complete the purchase in the manner and upon the terms herein, and that in case of his failure so to do, the said sum of money hereby receipted for shall be, at the option of the undersigned, forfeited as liquidated damage.

"It is further agreed that in the event of failure to convey good and sufficient title within 30 days from the date hereof, the said sum of money shall be refunded.

"Time is the essence of this contract. T. Berte Smith, Seller.

"Subject to the owner's approval, I hereby agree to the above provisions. C. E. Lawson, Purchaser."

It is next averred that, on September 29, 1906, the appellant, for a valuable consideration, sold and assigned to the respondent all the appellant's interest in the foregoing, and delivered to respondent with the assignment a written opinion of title, a copy of which is attached to the complaint, together with a complete abstract of title to the premises. It is further averred that the consideration which respondent agreed to pay for such transfer was set forth in a written agreement as follows:

"Seattle, Wash., September 29, 1906.

"For and in consideration of the sum of five hundred dollars, I, the undersigned, C. E. Lawson, hereby sell, assign, and transfer to C. W. Sprague, all my right, title and interest in and to the annexed receipt and contract. It is understood and agreed that the assignee herein shall pay to said C. E. Lawson the sum of five thousand and five hundred

($5,500) dollars in addition to the consideration herein above named. When the deed, covering the property named in said attached receipt, to-wit: Lots 7, 8, 9, 10, 11, 12, block 105, D. T. D. Denny's first addition to North Seattle, Washington, shall have been delivered by T. Berte Smith and wife to said C. W. Sprague or his assigns; it being understood that said sum of five thousand and five hundred dollars ($5,500) shall be paid upon the consummation of the transfer contemplated in said receipt. C. E. Lawson.
"R. G. Fisher, Agent."

It is alleged that the receipt referred to in the foregoing memorandum is that given by Smith to appellant, a copy of which is hereinbefore set out; that, by further agreement with respondent, the 8th day of October, 1906, was fixed as the time when appellant's vendor should consummate the transfer to respondent; and that on said day the appellant's vendor, by his duly authorized agent, was present at the time and place designated by the respondent, and had in his possession and was ready and willing to deliver to respondent a deed duly executed conveying the premises to respondent; that respondent failed to appear at said time and place, and failed to make tender of the purchase price, or to claim delivery of a deed, and has at all times since so failed; that by reason of the foregoing, the sum of $5,500 became due and payable on October 8, 1906, and judgment is demanded for that sum with interest.

The question to be considered here is whether the foregoing facts as stated constitute a cause of action against the respondent. We think at least some of the objections to the sufficiency of the complaint which are discussed in respondent's brief must be held to sustain the judgment below. In the first place, it will be observed that the first written instrument above set forth states in one place that the full purchase price for the land is $30,000, but in that part of the instrument which specifies how the payments shall be made, it appears that the required payments aggregate $38,000. It is therefore evident that the contract is so ambiguous

and indefinite that the purchaser, and particularly the assignee of the purchaser, who must refer to the written instrument as the foundation of all his rights in the premises, was not advised what sum he should tender to the owner, particularly by way of executed notes secured by second mortgages, and it is not alleged that the respondent was more definitely advised by demand from the owner or otherwise. In view of the aforesaid ambiguity, until it is shown that the respondent was definitely advised as to the actual intention with reference to the purchase price, he should not be held to be in default under the option to the extent of making him now personally liable to appellant.

Again, it will be remembered that the respondent's relation to this matter arises wholly from an alleged assignment of the purchaser's option, and the allegation is made that respondent executed the second written instrument set out above, which purports to contain a promise to pay the appellant $5,500 more under certain conditions therein named. The agreement shows upon its face, however, that it was not made by respondent himself, as it was not signed by him. It bears the signature of "R. G. Fisher, Agent"; but there is no allegation in the complaint that Mr. Fisher was the agent of the respondent, that he acted in respondent's behalf, that he had authority to do so, that he signed the instrument for respondent, or that he, as agent, intended to bind the latter. The only attempt to connect respondent with it is by the following allegation: "And as a further consideration for said assignment said defendant on the said date agreed to pay to said plaintiffs the sum of $5,500 in accordance with the terms of memorandum, true copy of which is set out below, which was then and there executed." It is pertinently observed by respondent's counsel, however, that the above averment is simply the pleader's conclusion as to the legal effect of the instrument, which is specifically and fully set out. The contract being set out, it must speak for itself, and the demurrer does not admit the pleader's legal con-

clusions concerning it. The court must construe its effect independently of the pleader's interpretation of it.

"Where the contract is in writing and appears on its face to be the personal contract of the agent only, it must be declared on as made by the principal through the agent." 16 Ency. Plead. & Prac., p. 901.

See, also, *Buffalo Catholic Institute v. Bitter*, 87 N. Y. 250; *Bonnell v. Griswold*, 68 N. Y. 294; *Penn Mut. Life Ins. Co. v. Conoughy*, 54 Neb. 123, 74 N. W. 422. In the last-named case, the following observations of the court we think are particularly apt here:

"This count of the petition does not state a cause of action against the insurance company. It does not appear upon the face of the check, or by any other averment in the petition, that Schmidt was the general agent of the insurance company, nor for whom he was general agent, and if the language of the petition could be construed as equivalent to an express averment that Schmidt when he drew this check was then and there the general agent of the insurance company, still the petition is fatally defective, because it contains no averment that Schmidt intended to bind his principal by the drawing of this check nor that it was drawn in connection with his principal's business, nor that he had any authority to bind his principal by the the drawing of bills of exchange. So far as the petition discloses, the check sued upon is the individual contract of Schmidt. The words 'general agent' following his signature on the check are *descriptio personae*, and if conjectures and inferences are to be indulged, then, so far as this count of the petition discloses, Schmidt's principal might have been the American National Bank."

It furthermore appears from the complaint, by the attorney's opinion concerning the title, a copy of which is attached to the complaint and made a part of it, that the appellant's vendor could not carry out the terms of the original contract, for the reason that four of the lots described in that agreement are shore lands under the waters of Lake Union, the title to which was in the state of Washington. It is true that the bare averment is made that the respondent agreed to ac-

cept the title as exhibited in the attorney's opinion. But that is another statement of a legal conclusion as the pleader's interpretation of the effect of the written instrument. The instrument to which respondent is alleged to have been a party recites that he shall pay appellant when the deed conveying the property shall have been delivered by appellant's vendor to appellant or his assigns, and that the payment shall be made "upon the consummation of the transfer contemplated in said receipt." The transfer contemplated in the receipt mentioned is described therein as the conveyance of "good and sufficient title within thirty days from the date hereof." The context of the complaint, including the alleged written instruments, therefore shows that respondent was to receive "good and sufficient title," and any averment to the contrary effect is a mere conclusion. The vendor was, therefore, not in position to convey the lots to either the appellant or to the latter's assignee, the respondent herein. Under such circumstances, a tender or offer to perform on respondent's part would have been a useless ceremony, and his failure to do so cannot be made the basis of recovery in behalf of appellant, on the theory that respondent was in default in such a way as to render his alleged promise to pay appellant an absolute obligation. Respondent was entitled to a marketable title to all the lots, a thing which appellant's vendor could not deliver, and respondent could therefore withdraw without being under any further obligations in the premises. *Owen v. Henderson*, 16 Wash. 39, 47 Pac. 215, 58 Am. St. 17; *Landers v. McIntyre*, 8 Wash. 203, 35 Pac. 1095; *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583.

For the foregoing reasons, we think the court did not err in sustaining the demurrer to the complaint, and the judgment is affirmed.

FULLERTON, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7557. Decided December 26, 1908.]

NATHAN H. DODDS, *Appellant*, v. ELIZA S. DODDS *et al.*, *Respondents*.[1]

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS NOT RAISED BELOW—DIVORCE—TITLE TO PROPERTY. Where the pleadings in an action for divorce alleged the title to certain property to be in the husband, and the same was not an issue, he cannot, for the first time on appeal, claim that he held the title in trust for children under the will of a deceased wife.

DIVORCE—DECREE—DISPOSITION OF PROPERTY. Upon granting a divorce, the court properly disposes of their property rights with regard to their respective merits, their subsequent condition, the party through whom the property was acquired and the burdens imposed thereon for the benefit of the children; and it is immaterial that the husband some years previously had conveyed the same to the wife upon consideration of love and affection and an agreement to live with him, which consideration had failed.

QUIETING TITLE—PERSONS ENTITLED. Where neither husband nor wife had any beneficial interest in property purchased in the name of the wife and by her conveyed to the owner, such owners title should be quieted, as against plaintiffs claiming as heirs of the wife.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 4, 1907, awarding certain property to the wife upon granting a divorce to the husband. Affirmed.

John E. Humphries, *George B. Cole*, and *T. G. Gregson*, for appellant.

Guie & Guie, for respondent Dodds.

Henry S. Noon and *Hugh Henry Benton*, for respondent Hoenshell.

RUDKIN, J.—This is an appeal from that portion of a decree of divorce disposing of the property rights of the parties. The appellant and the respondent Eliza S. Dodds intermarried on the 2d day of January, 1895, and remained

[1]Reported in 98 Pac. 748.

husband and wife until the entry of the decree from which this appeal is prosecuted. One child, now of the age of seven years, was born of this union. At the time of the marriage, the appellant was the owner of seventy acres of land, in King county, forty acres of which was disposed of long prior to the decree in question. On the 2d day of May, 1902, the husband conveyed to the wife an undivided one-half interest in the remaining thirty acres, in consideration of love and affection, and for the further consideration that the wife should continue to live with the husband as his wife during the remainder of his natural life. By the terms of the decree of divorce, an undivided one-half interest in this thirty acres, the whole being of the value of about $9,000, was awarded to the wife, who was also awarded the care, custody and control of the minor child.

In support of his appeal, the appellant contends that he holds an undivided one-half interest in the above property in trust for his children, under the will of a former wife, that the consideration for the deed from the appellant to the respondent Eliza S. Dodds has wholly failed, and that all the property in controversy should have been awarded to him. The title of the appellant to the property above described, subject to the conveyance of the undivided one-half interest to the wife, was averred in the complaint, admitted in the answer, and reaffirmed in the reply. The question of title was, therefore, not an issue on the trial, and the trust theory now advanced for the first time is a mere afterthought, which we must decline to discuss or consider.

The consideration for the deed from the husband to the wife has in a large measure failed. The love and affection part finds little support in the record, and the covenant on the part of the wife to live with the husband as his wife during the remainder of his days has been rendered impossible of performance by the decree of divorce. But the consideration for this deed is a matter of little moment now. The court below had jurisdiction of the parties, and was com-

pelled to make a just and equitable division of their property and property rights, having regard to their respective merits, the condition in which they would be left by the divorce, the party through whom the property was acquired, and the burdens imposed upon it for the benefit of the child. Considering all these facts and circumstances, we are unable to say that the disposition made by the trial court was either inequitable or unjust.

The claim of the appellant to certain lots purchased in the name of the respondent Eliza S. Dodds, and thereafter conveyed to the respondent Hoenshell, is wholly without merit and requires no discussion. Under the uncontradicted testimony, neither the husband or wife had any beneficial interest in this property at any time, and the title of the respondent Hoenshell was properly quieted. Let the judgment be affirmed.

CROW, MOUNT, and DUNBAR, JJ., concur.

HADLEY, C. J., FULLERTON, and CHADWICK, JJ., took no part.

[No. 7582. Decided December 26, 1908.]

L. C. HALL *et al.*, *Appellants*, v. CHARLES COWEN *et al.*, *Respondents*.[1]

AGRICULTURE—LIENS—LABOR OR MATERIALS—RENTAL OF TOOLS. A claim for the rental of scrapers, due to the owner from a contractor who cleared and graded certain lots, is not one for "labor performed or materials furnished," within Bal. Code, § 5902, providing a lien therefor upon the land in favor of one who clears, grades, or improves the same.

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY. In an action to enforce a lien against lots in which the lien fails and merely a money judgment is entered against the contractor, no appeal lies where the amount in controversy was less than two hundred dollars.

[1]Reported in 98 Pac. 670.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 7, 1908, upon findings in favor of certain defendants, in an action to foreclose a lien against their property. Affirmed.

B. B. Crawford, for appellants.
Bamford A. Robb and *Charles P. Harris*, for respondents.

RUDKIN, J.—The defendant Cowen, as owner of certain lots in one of the additions to the city of Seattle, employed the defendants Wagner & Harney to clear, grade and fill in certain streets adjacent thereto. The contractor hired or rented five wheel scrapers from the plaintiffs, to be used in and about the work of grading and filling in the street. Thereafter the plaintiffs filed a lien against the lots owned by the defendant Cowen, for the sum of $112.50 for the rental or hire of the scrapers, and this action was instituted against the contractors and the owner of the property to recover the amount of the lien claim against the contractors, and to foreclose the lien against the abutting property. The court below gave a personal judgment in favor of the plaintiffs and against the contractors for the sum of $88.25, but denied a foreclosure of the lien. From this judgment the plaintiffs have appealed.

The lien was claimed under Bal. Code, § 5902 (P. C. § 6104), which reads as follows:

"Any person who, at the request of the owners of any real property, his agent, contractor or subcontractor, clears, grades, fills in or otherwise improves the same, or any street or road in front of, or adjoining the same, has a lien upon such real property for the labor performed, or the materials furnished for such purposes."

It seems to us too plain to admit of extended argument or discussion that a claim for the rental of scrapers is neither for labor performed or materials furnished within the purview of this section. *Allen v. Elwert*, 29 Ore. 443, 44 Pac.

823, 48 Pac. 54; *McCormick v. Los Angeles Water Co.*, 40 Cal. 185.

The appellants further contend that the court erred in reducing their claim from $112.50 to $88.25; but inasmuch as there is no lien we are without jurisdiction to review the judgment in a law action where the original amount in controversy is less than $200. *Henry v. Thurston County*, 31 Wash. 638, 72 Pac. 488; *Gies v. Broad*, 41 Wash. 448, 83 Pac. 1025.

The judgment is affirmed.

HADLEY, C. J., CROW, FULLERTON, MOUNT, and DUNBAR, JJ., concur.

[No. 7596. Decided December 26, 1908.]

H. C. ADAMS, *Appellant*, v. THE COLUMBIA CANAL COMPANY, *Respondent*.[1]

APPEAL—RECORD—STATEMENT OF FACTS—NECESSITY OF CERTIFICATE. A statement of facts not certified by the trial judge, but simply authenticated by the affidavit of the stenographer who reported the case, will be struck out on motion.

SAME—STATEMENT OF FACTS—NECESSITY. In the absence of a bill of exceptions or statement of facts, the supreme court cannot review error in the admission of testimony, or the sufficiency of the evidence to justify the verdict.

APPEAL—REVIEW—HARMLESS ERROR—RULING ON PLEADINGS. Error in overruling a demurrer to an answer will be regarded as harmless, where no findings were made and the evidence is not brought up, and the trial court may have found the allegations of the complaint untrue.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered June 13, 1908, in favor of the defendant, dismissing an action for an injunction, after a trial on the merits before the court without a jury. Affirmed.

[1]Reported in 98 Pac. 741.

McDonald, Rupp & Bryson, and *Cain & Hurspool*, for appellant.

Shank & Smith, for respondent.

RUDKIN, J.—Respondent has moved to strike the statement of facts in this case, because not certified by the trial judge as provided by law. The statement of facts is simply authenticated by the affidavit of the stenographer who reported the case at the trial, and the motion to strike must be granted.

The assignments of error are: (1) That the court erred in overruling the demurrer to the further and affirmative defense contained in the answer; (2) that the court erred in admitting testimony in support of the affirmative defense; and (3) insufficiency of the evidence to justify the judgment. The second and third assignments cannot be considered in the absence of a statement of facts or bill of exceptions, and there is nothing in the record to show that the overruling of the demurrer was prejudicial, if erroneous. All the material allegations of the complaint were denied by the answer, and the court made no finding of facts or conclusions of law. For aught that appears of record, the court may have found that the allegations of the complaint were untrue, and error will never be presumed. Without passing upon the sufficiency of the answer, the judgment must therefore be affirmed; and it is so ordered.

HADLEY, C. J., FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7418. Decided December 28, 1908.]

JOHN H. WAREHIME, *Respondent*, v. LEWIS H. SCHWEITZER *et al.*, *Appellants*.[1]

APPEAL—PRESERVATION OF GROUNDS — EXCEPTIONS TO FINDINGS. One general exception to several distinct findings of fact is insufficient to secure a review of the findings unless all are erroneous.

APPEAL—RECORD—STATEMENT OF FACTS—INSUFFICIENCY OF EXCEPTIONS TO FINDINGS. A statement of facts will not be struck out because of insufficiency of exceptions to findings of fact, where errors are assigned relating to the trial and the introduction of testimony.

CONTINUANCE — CONDITIONS — PAYMENT OF COSTS. It is not an abuse of discretion to require the payment of costs, including the mileage of plaintiff's witnesses, as a condition for the granting of a continuance, asked for on the opening of the trial on behalf of the defendant who was unable to be present because in jail, where such defendant had had fifteen days notice of the day of trial.

APPEAL—REVIEW—DISCRETION—CONTINUANCE. The refusal of a continuance will be reviewed only for abuse of discretion.

REPLEVIN—EVIDENCE—RELEVANCY. In replevin of a horse, where plaintiff has testified positively that his son had no authority to sell the horse but had possession only for the purpose of working it, questions on cross-examination as to what plaintiff's son was to do with the money, or if he would have been satisfied if the son had mortgaged the horse, and the like, are properly excluded as irrelevant and immaterial.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for King county, Yakey, J., entered November 29, 1907, upon findings in favor of the plaintiff, in an action of replevin, tried before the court without a jury. Affirmed.

Longfellow & Fitzpatrick (Arthur C. Dresbach, of counsel), for appellants.

H. A. P. Myers, for respondent.

HADLEY, C. J.—This action was brought for recovery of the possession of a horse and of a set of double harness.

[1]Reported in 98 Pac. 747.

The value of the horse is fixed in the complaint at $350, and that of the harness at $50. The right of the plaintiff to recover possession was disputed, and the cause was tried by the court below without a jury, resulting in a judgment that the plaintiff shall recover the possession of the horse, or its value, fixed at $275; also, the sum of $90 as the value of the use of the horse by the defendant. The judgment also provides for the recovery of the harness, or its value, fixed at $50. The defendants have appealed.

The respondent has moved to strike the statement of facts upon the ground that no sufficient exceptions were made to the findings of facts. The court's findings embody six separately stated and independent groups of facts distinctly found, and the only exception taken thereto appears in the margin below the findings and conclusions, as follows: "Defts. except to making above finding at this date, and expressly except to the finding and conclusion herein contained." It will be seen that the language, literally read, appears to refer to but one finding, and no one is specified so that either the trial court or this court can tell which was intended. But assuming that the intention may have been to except to all the findings, this court has held that such a general exception is insufficient, and that under it the findings will not be reviewed unless it appears that all are erroneous. *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815, and cases there cited. See, also, *Horrell v. California etc. Ass'n.*, 40 Wash. 531, 82 Pac. 889.

It is not manifest that all the findings here are erroneous, and they cannot therefore be reviewed within the rule heretofore followed by this court. The statement of facts will, however, not be stricken for all purposes, but will be retained for the purpose of reviewing errors relating to the manner of trial and the introduction of testimony, following the decisions cited below. *Lilly v. Eklund*, 37 Wash. 532, 79 Pac. 1107; *Bringgold v. Bringgold*, 40 Wash. 121, 82 Pac. 179; *Smith v. Glenn*, 40 Wash. 262, 82 Pac. 605.

It is assigned that the court erred in denying appellants' motion for a continuance at the beginning of the trial. A motion for continuance was made just as the cause was called for trial, and affidavits were filed in support of the motion, to the effect that one of the appellants was at the time incarcerated in jail at Tacoma, and could not attend the trial at that time, it being contended that he was a material witness. Much was said between court and counsel about the motion as it was being considered, and the court at no time unconditionally refused to grant the continuance. In fact, the record makes it appear that the court was inclined to allow a continuance, but he stated to appellants' counsel that if it was granted the respondent would be entitled to recover his costs. Thereupon the counsel asked the court if it would hold that the respondent's expenses would include mileage from Lincoln county to Seattle and return at ten cents per mile. The court replied that he believed respondent would be entitled to that sum. Upon being informed that the mileage all told for two witnesses would be about twelve hundred miles, the counsel simply stated that, in the absence of his client, he could not undertake to pay more than about half the sum indicated. The court replied that he thought respondent would be entitled to all his costs. The appellant thereupon excepted, and the trial proceeded.

The court did not refuse to continue the cause, but simply stated that, as a condition of the continuance, the respondent should recover his costs, and did not say that the costs must be paid in advance. In view of the fact that the motion was sprung just as the trial was called, it appearing that the absent appellant was notified of the assignment for trial at least fifteen days before the day of trial, we think it should not be said that, under the circumstances detailed, the court abused its discretion, particularly when there was not an absolute refusal to grant the continuance. In the absence of an abuse of discretion, the refusal to grant a continuance will not be reviewed by this court. *Catlin v.*

Harris, 7 Wash. 542, 35 Pac. 385; *Juch v. Hanna*, 11 Wash. 676, 40 Pac. 341.

The appellants assign as error that the court erred "in excluding and refusing testimony introduced by appellants, and in not allowing them sufficient latitude in cross-examination of respondent and his business associates in the matter of handling and caring for the property in question." This assignment is very general and does not direct attention to any specific ruling as erroneous. However, treating the references to the statement of facts as made in the argument of the brief as supplementary to the assignment itself, we have examined the cross-examination as indicated, and we believe that no prejudicial error was committed in sustaining objections to the several questions. It was the theory of appellants that respondent's son had been given possession of the horse with sufficient authority to sell it. Respondent had testified positively that he gave no such authority to the son, or any one else, and such had been the whole trend of his examination-in-chief. Therefore the question "Was he [his son] to send the money back to you?" was wholly immaterial and irrelevant as cross-examination. The same is also true of the question: "If he [his son] had taken a mortgage, you would have been satisfied?" The question: "Did he [his son] have absolute control of this team?" was also irrelevant, since the witness had testified that the son was merely given control of it for the purpose of working it. Other questions on cross-examination involved in this assignment we think were equally immaterial under the issues, having reference to the examination-in-chief.

Under the record before us, we find no error in the denial of the motion for a new trial, and the judgment is affirmed.

CROW, DUNBAR, and MOUNT, JJ., concur.

FULLERTON, J., dissents.

[No. 7683. Decided December 30, 1908.]

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*, v. MARTIN GEORGE *et al.*, *Appellants*.[1]

EJECTMENT—TITLE OF PLAINTIFF. The legal title through a patent from the government is sufficient to support ejectment.

PUBLIC LANDS — DONATION CLAIM — ABANDONMENT — RAILROAD GRANT. A portion of a donation land claim, originally settled upon, is part of the public domain and is not reserved from a railroad grant, where it was not included in the Surveyor General's subsequent survey, and had been abandoned by the settler, who in lieu thereof acquired title to the claim as surveyed.

ADVERSE POSSESSION—ABANDONMENT—ACCEPTING LEASE. A claim of adverse possession to land is abandoned by accepting a lease thereof from the owner.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 20, 1908, in favor of the plaintiff, in an action of ejectment. Affirmed.

L. C. Stevenson and *C. L. Westcott*, for appellants, contended that the premises were not a part of the public domain, and were not included in the grant to the railroad. In *re Elliott*, 1 Land Dec. 303; *Texas & Pac. R. Co. v. Hancock*, 3 Land Dec. 164; *Hastings etc. R. Co. v. United States*, 3 Land Dec. 479; *St. Paul etc. R. Co. v. Leech*, 3 Land Dec. 506; *Boss v. Central Pac. R. Co.*, 11 Land Dec. 571; *Oregon & Cal. R. Co. v. Kuebel*, 22 Land Dec. 308; *In re Oregon & Cal. R. Co.*, 28 Land Dec. 345; *Oregon Short Line R. Co. v. Fisher*, 26 Utah, 179, 72 Pac. 931; *Union Pac. R. Co. v. Harris*, 76 Kan. 255, 91 Pac. 68; *Nelson v. Northern Pac. R. Co.*, 188 U. S. 108, 23 Sup. Ct. 302, 47 L. Ed. 406; *Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416, 79 N. W. 635.

B. S. Grosscup and *W. C. Morrow*, for respondent, cited: *Railway Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578; *Bybee v. Oregon & Cal. R. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35

[1]Reported in 98 Pac. 1126.

L. Ed. 305; *Missouri etc. R. Co. v. Cook*, 163 U. S. 491, 16 Sup. Ct. 1093, 41 L. Ed. 239; *Northern Pac. R. Co. v. Hasse*, 197 U. S. 9, 25 Sup. Ct. 305, 49 L. Ed. 642; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668; *Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82; *Alexander v. Kansas City etc. R. Co.*, 138 Mo. 464, 40 S. W. 104; *Jamestown & N. R. Co. v. Jones*, 7 N. D. 619, 76 N. W. 227; *Hamilton v. Spokane & Pac. R. Co.*, 3 Idaho 164, 28 Pac. 408; *Oregon & Cal. R. Co. v. United States*, 190 U. S. 186, 23 Sup. Ct. 673, 47 L. Ed. 1012; *Hall v. Russell*, 101 U. S. 503, 25 L. Ed. 829; *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654; *Yesler Estate v. Holmes*, 39 Wash. 34, 80 Pac. 851; *Northern Pac. R. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044; *Northern Pac. R. Co. v. Ely*, 197 U. S. 1, 25 Sup. Ct. 302, 49 L. Ed. 639.

MOUNT, J.—Respondent brought this action in ejectment against the appellants. The cause was tried to the court below without a jury. The trial resulted in a judgment in favor of the plaintiff. The defendants appeal.

The property in dispute is a strip of land in lot 7, section 19, township 19, north, of range 5, east, W. M., lying between two parallel lines distant thirty-three feet and two hundred feet, respectively, northerly from the center line of respondent's main track of railway, crossing said lot 7. Said parallel lines run parallel to the center line of the railway. The respondent claims this land is a part of a grant of right of way, under the act of Congress approved July 2, 1864 (13 U. S. Stats. at Large, 367), to the Northern Pacific Railroad Company. The appellants claim that, at the time of the passage of the act of 1864, the land in question was not public land of the United States, by reason of the fact that in October, 1854, one Henry Whitesell, father of one of the appellants, settled upon the three hundred and twenty-acre tract, including the land in question, as a donation land claim, under the act of Congress approved September 25,

1850; that said Whitesell was in possession of the land at the time of the passage of the act of 1864. Appellants also claim title by adverse possession for a period of more than ten years.

At the trial it appeared that the Northern Pacific Railroad Company, on March 26, 1884, filed in the office of the commissioner of the general land office its map of definite location of that portion of its road extending over the land in question, and thereafter duly constructed the road, which construction was reported to the President of the United States and accepted on October 7, 1884; that the land in question was selected by the railroad company on February 25, 1885; that the selection was approved in May, 1895, and patent issued to the company in the same month; that there had been no filing on this land by any person other than the railroad company; and that, so far as the records show, the land was public land at the time of the passage of the act of 1864. It also appeared that the respondent has at all times been assessed and paid taxes on the land. It also appears that the appellants, in the year 1897, leased from the respondent the right to fence and cultivate the land in question, for the period of three years from May 1st of that year.

On the part of the appellants it appears that, in the year 1854, Henry Whitesell, under the provisions of the act of Congress approved September 25, 1850, entitled "An act to create the office of surveyor general of public lands in Oregon and to provide for the survey and to make donations to settlers of said public land," settled upon a certain three hundred and twenty-acre tract of land, which tract included the land in question in section 19. In the year 1873 the donation claim of Mr. Whitesell was surveyed by the surveyor general, whose duty it was to locate such claims, and the claim of Mr. Whitesell was located wholly in section 30, township 19, north, range 5, east, W. M., and covered no part of the property in question now; that subsequently Mr. Whitesell proved his claim to the land as located by the sur-

veyor general, and received a patent therefor, which was accepted and filed of record. The land so patented was wholly within section 30, and did not embrace lot 7, in section 19, the land in question.

Two points are contended for by appellants: (1) that respondent must recover upon the strength of its own title, and (2) that the land in question was not public land at the time of the passage of the act of 1864. As to the first point, it clearly appears that the respondent is the holder of the legal title through a patent from the government, which is sufficient. The second point depends upon the fact whether the claim of Mr. Whitesell, initiated in 1854, removed the land in question from the operation of the grant of 1864. Conceding, without deciding, that the appellants may now raise this question, it appears to have been settled adversely to their contention by the supreme court of the United States, in the case of *Oregon & Cal. R. Co. v. United States*, reported in 190 U. S. 186, 23 Sup. Ct. 673, 47 L. Ed. 1012, where the court said, at page 195:

"It is clear that title to the land here in question never passed from the United States under the donation acts of 1850 and 1853, since the donation was only made to those 'who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act.' *Hall v. Russell*, 101 U. S. 503; *Maynard v. Hill*, 125 U. S. 190. As these conditions were never complied with, the land continued to be the property of the United States, to which the railroad grant subsequently attached, unless such grant was defeated by the fact that the donation notification still remained of record in the office of the surveyor general. As the land had neither been 'granted, sold, . . . occupied by homestead settlers, preempted, or otherwise disposed of,' the bill can only be sustained upon the ground that at the time land was selected it was 'reserved' from sale. But for what purpose was it reserved? Not for the donation settler, since he had abandoned the land fifteen years before; not for the United States, since every possible incumbrance had been removed from it, and it had

lapsed into its original condition of public land, open to preemption or sale. It is true the donation notification had not been formally cancelled, but the donation acts made no provision for such cancellation, although it may, perhaps, have been within the power of the land department to take such action, even prior to the act of 1894. This, however, was not done, but the land might have remained in that condition permanently, had not some other person applied to enter or purchase it by showing that it had been abandoned by the original donee. But, if this may be done by an individual preemptor, why may not a railroad company do the same thing by claiming the land under its grant, and showing in defense of this suit that it had actually been abandoned? . . . We think that, considering the fact that fourteen years had elapsed since original settlement, the railroad company would be authorized to infer that the donee had abandoned the land, as in fact appears to have been the case. Under the facts of the case we think the lands were not reserved within the meaning of the granting act."

So in this case, prior to the time of the location of the railway upon the land, Mr. Whitesell had abandoned the same, and in lieu thereof, had acquired title to the land in section 30. The land in question was, therefore, not reserved at the time the grant of the railway company attached. If there was a claim of adverse possession of this land by the appellants prior to the lease of 1897 above referred to, such claim was abandoned by the making of the lease.

The judgment of the trial court appears to be right, and is therefore affirmed.

HADLEY, C. J., CROW, DUNBAR, FULLERTON, and CHADWICK, JJ., concur.

[No. 7428. Decided January 2, 1909.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Appellant*, v. VINCE H. FABEN, *Respondent*, F. JOSEPH ROE, *Defendant*.[1]

APPEAL—ORDERS REVIEWABLE—AMOUNT IN CONTROVERSY—DISMISSAL. Upon motion to dismiss an appeal because the original amount in controversy was less than $200, the supreme court may inquire into the merits so far as may be necessary to determine the fact of jurisdiction.

SAME. In an action upon an indemnity contract, the original amount in controversy, governing the jurisdiction of the supreme court on appeal, does not include a claim for attorney's fees incidental to the prosecution of such action.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 6, 1908, in favor of the defendants, dismissing on the merits an action upon an indemnity, after a trial before the court without a jury. Appeal dismissed.

William W. Wilshire, for appellant.

Larrabee & Wright, for respondent.

HADLEY, C. J.—This action was brought by the plaintiff, a surety company, to recover from the defendants an amount alleged to be due on a written instrument to indemnify the plaintiff. It is alleged that the plaintiff executed and delivered to the defendants a cost bond, on appeal to the supreme court of the state of Washington, in the penal sum of $200, the appeal having been taken by the defendant Roe in a cause in which he was plaintiff and the Standard Furniture Company was defendant; that Roe was the principal in the cost bond, and this plaintiff was sole surety; that in consideration of the execution and delivery of the bond by the plaintiff, the defendants in writing promised the plaintiff that

[1]Reported in 98 Pac. 764.

they would be held and obligated to the plaintiff to pay the premium of $5 per annum on said cost bond, and to indemnify the plaintiff and save it harmless from all loss, costs, charges, suits, damages, counsel fees, and expenses of whatever kind or nature which it might, for any cause at any time, sustain or incur by reason or in consequence of having executed said bond; that afterwards the appeal was dismissed by order of the supreme court, and a judgment for costs was given against Roe, as principal, and this plaintiff, as surety on the cost bond, in the sum of $87.15; that Roe as principal failed to pay the judgment, and this plaintiff was compelled to, and did, pay it, on June 4, 1906. It is alleged that demand was made of the defendants, before the bringing of this suit, that they reimburse the plaintiff by the payment to it of said sum of $87.15, and that they wholly failed to do so. Judgment is demanded against both defendants for said sum, and also for the additional sum of $125 on account of counsel fees alleged to have been incurred by plaintiff in the prosecution of this action. No service was made in this action upon the defendant Roe; and the defendant Faben answered separately, denying that he signed the application for the appeal bond in the manner alleged in the complaint, and averred that, if he signed the application at all, there was no consideration received by him for doing so, and that his signature was for the sole purpose of identifying the applicant for the bond, the defendant Roe, and of verifying the statement of the latter. The cause was tried by the court without a jury, and resulted in a judgment of dismissal, with prejudice, in favor of the defendant Faben. The plaintiff has appealed.

The respondent has moved to dismiss this appeal, on the ground that the original amount in controversy is insufficient to give this court jurisdiction of the appeal. It will be remembered from the foregoing statement of the case that the amount demanded before bringing this suit was $87.15, and that a further demand was made in the complaint for $125 as attorney's fees incidental to the prosecution of this

suit. The real question raised by the motion is whether the amount of the demand for attorney's fees can be considered in determining whether the "original amount in controversy" is within the jurisdiction of this court. Appellant argues that the questions raised by the motion cannot be determined without an examination into the merits. In any event, when the jurisdiction of this court is challenged, it becomes necessary to ascertain from the record whether jurisdiction in fact exists, and in so far as an examination into the merits may be necessary to determine the question, it is the duty of the court to make reference thereto.

This is undoubtedly a civil action at law for the recovery of money, and it is provided by §4, art. 4, of our state constitution, that the appellate jurisdiction of this court shall not extend to such actions when the original amount in controversy does not exceed $200. The same provision is also made by statute, Bal. Code, § 4650 (P. C. § 4330). We believe that the word "original," as used in the constitution and statute, was for a significant and definite purpose, that purpose being precisely what the ordinarily accepted meaning of the word would indicate. The word is defined as follows: "Pertaining to the origin or beginning; preceding all others; first in order; primitive; pristine." It seems manifest from a consideration of the above definition that the amount in controversy to which the appellate jurisdiction of this court extends must be that which was in actual dispute from the beginning before the action was brought, and that it does not include claims for attorney's fees or otherwise, which are merely incidental to the suit which was brought for the recovery of the original amount. The action was not primarily brought to recover attorney's fees, but to recover the original amount in dispute. A different interpretation would permit a party bringing an action to transgress upon good faith in order that he might reach this court with a controversy. For example, he might bring a suit to recover $50, and claim an attorney's fee in the action for the sum

of $151. If the amount claimed as an attorney's fee should have to be considered together with the original amount in controversy in determining the question of jurisdiction, then this court would have to assume jurisdiction and review the cause although the person bringing the suit might well have known that, if he was entitled to recover an attorney's fee at all, it could not reasonably exceed $25.

The constitutional provision was intended to prevent this court from reviewing controversies over small amounts, and it was not intended to place it within the power of a party to accomplish a review of his case here by merely adding to the original amount a demand for a sum which he himself may arbitrarily fix and as a mere incident to his suit. This interpretation in no sense deprives the appellant of the right to recover. If its contract is such as gives it the right to recover attorney's fees incidental to the principal recovery, that right may also be enforced. The original amount in controversy is within the jurisdiction of a justice of the peace. But if that tribunal cannot afford adequate relief, including an attorney's fee, the superior court is open to appellant with ample facilities by way of jury trial or otherwise to investigate the controversy. The constitution and the statute give to appellant the privilege of submitting his case to either of the tribunals mentioned, but for the reasons above stated, both explicitly provide that he cannot avail himself of the appellate jurisdiction of this court.

The appeal is therefore dismissed for want of jurisdiction in this court.

DUNBAR, MOUNT, CROW, and FULLERTON, JJ., concur.
RUDKIN and CHADWICK, JJ., took no part.

[No. 7446. Decided January 4, 1909.]

CHARLES R. McCORMICK *et al.*, *Respondents*, v. PAUL F. TAPPENDORF *et al.*, *Appellants*.[1]

SALES—DELIVERY—CASH PAYMENT—BREACH—VENDEE'S INABILITY TO PAY CASH—ACTION BY VENDEE—QUESTIONS FOR JURY. Upon a sale of ties to be delivered "to ship's tackle along the Columbia river," the terms of payment being "cash on presentation of bill of lading, inspection certificate and invoice" at a certain bank in Portland, which suspended business, the purchaser cannot maintain an action for damages for nondelivery, where it was not prepared to pay cash; and such fact is a question for the jury, where it appears that the vendor engaged a tug to take the ties to the vessel, ascertained that no funds were at the bank for payment, and by telegraph refused delivery until arrangements for cash payment had been made, and vendors answered by telegraph that arrangements for cash payment through Portland banks had not been made and proposed to pay by a ten day's sight draft.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—SALES—MEASURE OF DAMAGES. In an action for damages for failure to deliver ties sold to the plaintiffs, the admission of evidence of the expense of a journey taken to secure a settlement is not prejudicial error, where, by the instructions to the jury, the damages were restricted to the difference between the market and contract price, and towage expenses.

MOUNT, J., dissents.

Appeal from a judgment of the superior court for Clarke county, Reid, J., entered October 24, 1907, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Reversed.

A. L. Miller, for appellants.

Platt & Platt, for respondents.

HADLEY, C. J.—This is an action to recover damages for an alleged breach of contract to deliver a quantity of railroad ties. The terms of the contract are set forth in the following copy of a part of the correspondence between the parties:

[1]Reported in 99 Pac. 2.

"Portland, Oregon, January 23, 1906.
"Vancouver Lumber Company, Vancouver, Wash.

"Gentlemen: We hereby confirm our order for 50,000 pieces of 7x8-8′ merchantable Oregon pine ties. These ties not to run over 20 per cent No. 2 merchantable. Any excess No. 2 to be $2.00 per thousand feet less. Inspection and tally at loading point by inspector from Pacific Lumber Manufacturers' Association, or an inspector to be mutually agreed upon.

"Price $9.00 per thousand feet, less 2 per cent. Delivered to ship's tackle along the Columbia River where vessels drawing 20 feet can safely lie afloat. Terms cash on presentation of bill of lading, inspection certificate and invoice at the Bank of California, Portland. Delivery of the entire lot to be not later than June 1, 1906. You agree to notify us thirty days before wanting vessel. Vessel to receive the ties not less than 60,000 feet per day. Yours truly,

"Charles R. McCormick & Co.

"Accepted: Vancouver Lumber Co., by W. Tenney, Manager."

The complaint alleged that the defendants refused to deliver the ties, and recovery for resulting damages was demanded. The defendants answered that they were prepared to carry out their contract, and for that purpose had the ties sawed and delivered at the Columbia river; that they were ready and willing to deliver the ties according to the contract, but the plaintiffs refused to pay for the same or to make provision for payment as provided by the contract. The cause came on for trial before a jury, and resulted in a verdict for the plaintiffs in the sum of $2,325.83. Judgment for that sum was entered against the defendants, and they have appealed.

The court in its instructions did not submit to the jury any questions of fact except the amount of damages to be recovered. The appellants excepted to the action of the court in taking from the jury all questions relative to the contract and the breach thereof. It is contended that failure on the respondents' part to make preparations to pay cash

for the ties on delivery to the ship for loading would be such a breach of their contract as would excuse appellants from actually turning the ties over to them. It is also urged that there was such evidence tending to prove that the respondents made no preparations to pay cash as required the submission to the jury of the question of breach of the contract on the part of appellants. It will be noted that the terms of the contract called for delivery of the ties "to ship's tackle along the Columbia river," and the terms of payment are "cash on presentation of bill of lading, inspection certificate and invoice at the Bank of California, Portland." It is the respondents' contention that the appellants were required to deliver the ties to the ship and receive a certificate of inspection and an invoice, after which they were required to present these to the bank in Portland; that without this they cannot maintain that they are excused from liability. It is true that the appellants could have had no right of action for breach of contract until they had actually made delivery and payment had been refused; but the respondents brought this action, claiming a breach by appellants for failure to deliver the ties. We think they are not entitled to recover, and that appellants are excused, if the evidence shows that at the time the respondents were not in position to make payment as the contract required. One party need not perform a condition precedent if it appears that the other party cannot or will not perform.

"One of two parties should not be required to tender performance when the other has, by act or word, indicated that he will not, or cannot, accept it, or will not, or cannot, do that in return for which the performance was promised. Nor will the courts hold him any longer bound." 9 Cyc. 641.

There was evidence to the effect that, after a vessel was ready to take the ties in the Columbia river, the appellants ordered a tug to tow the ties out to the ship, and then telegraphed the specified bank in Portland to know if arrangements for payment for the ties had been made, and received

a negative reply. Appellants then went in person to the Bank of California in Portland, and also to the United States National Bank of Portland, of which latter bank some mention had been made as the place of payment, by reason of the suspension of business by the Bank of California in San Francisco on account of the recent fire and earthquake. They were informed that no arrangements had been made for payment through either bank. It was testified that appellants then telegraphed respondents that the ties would not be delivered until arrangements for cash payment were made as required by the contract; that the respondents replied by telegram and proposed that the ties be loaded and that the appellants accept a ten-days' sight draft. All this is proper evidence for the jury, as it has a tendency to show that the respondents were not prepared to, and could not, pay cash upon delivery of the ties, and comply with their contract. It is for the jury to say what was the fact in that regard. If they should find from the evidence that respondents had not made preparation to comply with the terms of their contract in regard to payment, and that for that reason they could not do so, then appellants were excused for refusing to actually deliver possession of the ties to respondents.

It is further assigned that the court erred in permitting respondents to testify concerning the expense of a trip from San Francisco to Portland for the purpose of trying to effect a delivery of the ties. This expense is claimed by respondents as an element of damages to be recovered in this action. In submitting the cause to the jury, however, the court did not submit the above question, but restricted the damages to the difference between the market price of the ties on the 1st of June, 1906, and the contract price, and also to money expended by respondents in the towage of vessels which were to receive the ties. It follows that, under no view of the criticized testimony, did prejudicial error accrue therefrom to appellants. For reasons heretofore stated, however, other questions should have been submitted to the jury, and the

judgment is reversed and the cause remanded with instructions to grant a new trial.

FULLERTON, CROW, and DUNBAR, JJ., concur.

MOUNT, J., dissents.

[No. 7652. Decided January 4, 1909.]

ISAM COOK, *Respondent*, v. PITTOCK & LEADBETTER LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—PROMISE TO REPAIR—DEFINITENESS. A promise by a foreman to repair a chute as soon as he could do so, is sufficiently definite to relieve a servant in a mill from the assumption of risk.

SAME—REASONABLE TIME FOR REPAIRS—QUESTIONS FOR JURY. Whether ten days was an unreasonable period for a servant to rely upon a promise to repair a chute, involving danger when occasionally cleaned out, is a question for the jury, where the repairs were in progress at the time of the accident and it was not shown when they were commenced.

MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE MACHINERY—EVIDENCE—ADMISSIBILITY. In an action for injuries sustained while cleaning out a defective chute for carrying away waste, requiring close proximity to the saws, it is not error to receive evidence of unguarded gears at another place, introduced for the purpose of showing that the chute could not be safely cleaned from that place, no recovery being sought on account of the unguarded gears.

SAME. In an action for injuries sustained by a servant while performing an act alleged and testified by him to be his duty to perform, it is not reversible error to admit evidence of whose duty it was before plaintiff went to work there.

SAME—TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE. It is not error to refuse requested instructions to the effect that a servant admitted that he knew and appreciated the dangers from working around an edger, where there was no such admission in the pleadings, as the court had no right to comment on the evidence.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered March 21, 1908, upon the

[1]Reported in 98 Pac. 1130.

verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a mill. Affirmed.

A. L. Miller and *R. W. Wilbur*, for appellant.

McMaster & Back, for respondent.

HADLEY, C. J.—This is an action to recover damages for personal injuries received by the plaintiff while, as employee of the defendant, he was at work at a gang edger in the defendant's lumber mill. The gang edger consisted of several saws operated upon a shaft or arbor. For the purpose of feeding lumber to the saws and conducting it away after being sawed, there were sets of iron rollers, operated by power both to the front and back of the saws. Underneath the saws was a chute for the purpose of conveying away the sawdust, splinters, and refuse from the saws. It is alleged, that the defendant negligently so constructed the chute that it was of insufficient size to properly convey away the refuse; that it maintained the chute of a size so small and crooked and so obstructed by beams and otherwise that, in the operation of the edger, the chute became clogged and filled with refuse; that the defendant failed to provide any proper or adequate means for stopping the edger for the purpose of cleaning the chute, and failed to provide any means for cleaning it except while the edger was in motion; that defendant required the operatives of the edger to clean the chute by means of a stick or pole while the edger was in operation, which means, because of the proximity of the saws, was dangerous.

The plaintiff was put to work at this edger, and he alleged that, after working there for a short time, he called the attention of the defendant's foreman to the defective condition of the chute, and the danger of cleaning it while the edger was running; that the foreman thereupon promised the plaintiff that the chute would be changed so as to obviate the

necessity of cleaning it while the edger was in motion, and requested the plaintiff to remain at work in operating the edger and cleaning out the chute and until the change could be effected; that thereupon the plaintiff, believing and relying upon the promise, agreed to and did continue at work, and continued to clean out the chute as before; that while the defective and dangerous condition remained unchanged, and while the plaintiff was so employed, the chute became choked so that it became necessary for the plaintiff to clean it by use of a stick or pole while the edger was in motion; that while he was so employed in poking and prying the refuse, the stick became caught in one of the saws, the plaintiff's right hand was thereby thrown into the saws and three of his fingers were cut off and the hand seriously and permanently injured. The defense was that the plaintiff assumed the risk of the dangerous situation, and that he was also guilty of contributory negligence. The cause was tried before a jury, and resulted in a verdict for the plaintiff in the sum of $3,000. Judgment was entered for the amount of the verdict, and the defendant has appealed.

The first assignment of error is that the court denied appellant's motion for nonsuit at the close of the testimony, submitted by respondent. In this connection the second assignment may also be considered, which is that it was error to deny appellant's motion to take the case from the jury at the close of all the testimony, and also the motion to instruct the jury to return a verdict for the appellant.

The testimony of respondent, in substantial effect, supported the averments of the complaint as we have outlined them above. From this testimony it appears that frequently some one would go upon the floor below, and by the use of a stick would push upwards into the chute, thereby releasing the accumulated refuse, but that this process would not release the whole of it by reason of a beam near the center which crossed it in such a manner as to leave but a small passageway for the refuse. It was shown that, to meet this

difficulty, the practice of thrusting a stick down into the chute from the floor above was followed. At the time of the respondent's injury, he requested another to go below to clean out there as far as it could be done, and it was while respondent undertook to finish the cleaning from above in the manner we have indicated that he received his injury. He had been instructed that the mill should not be stopped for the purpose of cleaning the chute, and there was, as he believed, no other way of doing it than that which he followed, considering the conditions as they existed. His testimony was to the effect that he complained at least twice of the danger of the situation, and of the necessity for a change, the last time about ten days before the accident, at which time the foreman promised that he would change it as soon as he could. The foreman did not admit that he made the promise, but he did not deny making it.

It is contended that the promise was too indefinite as to time to relieve respondent of the assumption of the risk, and to place the risk upon the appellant. We think the promise was as definite as it could well have been made unless it had been a promise to shut down the mill immediately and make the change. The promise in effect was to make the change as soon as it could be effected in the course of affairs while the mill was in operation. The testimony showed that the work of making the change was actually in progress when the accident happened, and it was not shown when the work was commenced. It is contended that the time which elapsed after the promise was an unreasonable period, and that the respondent could not continue to rely upon the promise and be relieved of assuming the risk for so long a period. It was for the jury to say whether the time was reasonable under all the circumstances. The doctrine is well established in this state, that a servant may rely upon such a promise for a reasonable time without assuming the risk, provided he continues to exercise ordinary care

commensurate with the danger of his surroundings. In *Crooker v. Pacific Lounge & Mattress Co.*, 29 Wash. 30, 69 Pac. 359, this court quoted approvingly the following from Shearman & Redfield on the Law of Negligence, § 215:

"There is no longer any doubt that where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or indeed, within any period which would not preclude all reasonable expectation that the promise might be kept."

It was held in that case that the question of a reasonable time was for the jury, and the same was also held in *Shea v. Seattle Lumber Co.*, 47 Wash. 70, 91 Pac. 623. To the same point see also the following authorities: Thompson, Com. Law of Negligence, § 4668; 1 Labatt, Master & Servant, §429; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148, 48 Am. Rep. 669; *Belair v. Chicago etc. R. Co.*, 43 Iowa 662; *Ferriss v. Berlin Machine Works*, 90 Wis. 541, 63 N. W. 234. The question of contributory negligence, under the showing in the record, was also for the jury, and the court did not err in submitting the cause to the jury.

Objection was made by appellant to the following question: "At the time this accident occurred, were those gears at the other end of the rollers at the tail end of the edger broken in any way?" The court overruled the objection. It is urged that this was error, for the reason that the pleadings raised no issue relative to the protection of any gears at the end of the rollers. Respondent's counsel stated at the time that the purpose of the question was to show the exposed condition of the gear at the other end of the rollers in order that it might be seen that respondent could not with safety operate from that end of the machine, and that it made it impossible for him to clean out the chute with a long stick, as appellant's counsel indicated he might have done.

We think the question was not an improper one, having in view its avowed purpose to show merely the surroundings. No claim was made before the jury for recovery by reason of unguarded gearing. Other objections to questions concerning the gearing were, also, properly overruled for the same reasons.

Objection was made to the following question: "Whose duty was it, prior to your going to work there, if you know?" (Referring to the persons whose duty it had been to clean out the chute prior to this injury.) The objection was overruled. We are unable to see any prejudicial error in this, in view of the fact that respondent alleged in his complaint that it was his duty to clean out the chute, and he also testified to the same thing. That fact became an issue in the case. While the question may have called for immaterial testimony, inasmuch as the real issue related to what was respondent's duty at the time, yet we do not see in it any reversible error. The same observations are applicable to other assignments of error concerning similar questions.

Error is assigned upon the refusal to give the following instruction:

"It is admitted by the plaintiff in this case that he was a man who knew and appreciated and understood the ordinary dangers of working around the edger, and this edger that he was running at the time of the injury, and it is admitted that he knew of the dangers about which he complains in this action; in other words, the plaintiff admits that he knew of the dangers of working around this particular machine on which he was injured."

No such admission was made in the pleadings, and the court had no right to comment upon the facts in evidence as the requested instruction would have required. What we have said with reference to the above requested instruction applies to other refusals also assigned as error. Some errors are assigned upon the instructions which were given, but we

think the entire charge, taken as a whole, fairly stated the law, and that no prejudice resulted therefrom.

The judgment is affirmed.

FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

RUDKIN and CHADWICK, JJ., took no part.

[No. 7365. Decided January 4, 1909.]

THE CITY OF SPOKANE, *Appellant*, v. A. M. MACHO, *Respondent*.[1]

CONSTITUTIONAL LAW—CLASS LEGISLATION—POLICE POWER—ORDINANCES—FALSE REPRESENTATIONS BY EMPLOYMENT AGENCIES. In an ordinance to regulate and license employment agencies, a section making it a misdemeanor for the keeper of an employment agency to make wilful misrepresentations, or to wilfully deceive any person seeking employment, and take a fee for such employment, is unconstitutional; since it is not general and impartial in its operation, but operates upon one class to the exclusion of others in respect to a penal act common to all classes of business, and exceeds the reasonable limit of police regulations.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 7, 1908, dismissing a prosecution for the violation of an ordinance, upon sustaining a demurrer to the complaint. Affirmed.

L. R. Hamblen, *F. D. Allen*, and *Harry A. Rhodes*, for appellant.

J. M. Geraghty and *Alex M. Winston*, for respondent.

CHADWICK, J.—Defendant was arrested and charged with the violation of an ordinance of the city of Spokane, Washington, entitled, "An ordinance licensing and regulating the keepers of employment offices and the business of employment agencies in the city of Spokane, providing a penalty

[1]Reported in 98 Pac. 755.

for the violation thereof," etc. Among other matters covered by the ordinance, it is provided:

"Sec. 7. It shall be unlawful for any person keeping an employment office to make any wilful misrepresentations to any person seeking employment through such office, or to wilfully deceive any person seeking employment through such office, and take a fee for such employment." Ordinances, Spokane No. A2633.

Defendant was convicted before the police magistrate of the city; whereupon he appealed to the superior court. In that court he demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, the defendant discharged, and from a judgment of dismissal, the city has appealed.

The charter provisions relied upon to sustain this prosecution are as follows:

"Sec. 53. To regulate or prohibit the carrying on within the corporate limits of the city, of occupations which are of such a nature as to affect the public health or good order of the city, or to disturb the public peace, and which are not prohibited by law; and to provide for the punishment," etc.

"Sec. 55. To provide for the punishment of all disorderly conduct and of all practices dangerous to the public safety or health, and make all regulations necessary for the preservation of public morality, health, peace, and good order," etc.

While no account of it was taken in the court below, subd. 5, § 59, "To license, tax, regulate, and control hawkers, peddlers, . . . and all other classes of business not otherwise in this charter provided for," is now urged as sufficient in itself, or when taken in connection with the others, to warrant a conviction and sentence. Assuming that it is within the police power of the city to enact an ordinance to protect the citizen from frauds, impositions, wilful misrepresentations, and deceits, § 7 of the ordinance in question cannot be sustained. It is a fundamental proposition that an ordinance must be fair in its terms, impartial in its operation,

and general in its application. Dillon, Municipal Corporations, 322; McQuillan, Municipal Ordinances, 193. The ordinance before us assumes to license and regulate the business of employment agencies. This has been held to be a proper exercise of the police power of the state. *Price v. People*, 193 Ill. 114, 61 N. E. 844. But § 7 goes further. It defines a common law crime and provides a penalty for its infraction; not for all who may be guilty of a like offence, but the employment agent who shall, by wilful misrepresentation or deceit, obtain the money of another. It cannot be denied that the business of the employment agent is a legitimate business, as much so as is that of the banker, broker, or merchant; and under the methods prevailing in the modern business world, it may be said to be a necessary adjunct in the prosecution of business enterprises. The vice of the section under discussion lies in this, that it makes an act criminal in one who may be engaged in a lawful business, while the act committed under like circumstances by another may not be so. A business may be classified by ordinance under the police power of a state if the object of the legislation is revenue, and all necessary and proper penalties may be provided to insure its due enforcement. But if the object is regulation merely, such classification will not be tolerated. *In re Camp*, 38 Wash. 393, 80 Pac. 547.

It was frankly admitted in the argument of this case that § 7 was enacted for the purpose of regulating the business of employment agencies. When exercising its power to regulate a business, the municipality may classify subjects of legislation, but the law must treat alike all of a class to which it applies, and must bring within its classification all who are similarly situated or under the same condition. From the very nature of things, there can be no dissimilarity of condition or situation between the employment agent who indulges in a false pretense and any other person who resorts to deceit or fraudulent representations to accomplish a wayward purpose.

"The classification must be based on some reason suggested by a difference in the situation and circumstances of the subjects treated, and no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar." *State v. Sheriff of Ramsey County*, 48 Minn. 236, 51 N. W. 112.

Under the rule just quoted, those engaged in a business lawful and orderly in itself, although subject to license and regulation, cannot be made a class upon which a penal statute shall operate to the exclusion of others; for the crime defined is not common to the business of employment agencies, but common to all, and to be sustained must include within its terms all who may be likewise guilty. It has been held that "an ordinance which would make the act done by one penal and impose no penalty for the same act done under like circumstances by another, could not be sanctioned or sustained because it would be unjust and unlawful." *Tugman v. Chicago*, 78 Ill. 405; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *May v. People*, 1 Colo. App. 157, 27 Pac. 1010; McQuillan, Municipal Ordinances, 193.

While the cases cited were all upon a different state of facts, in that they sought to exempt a class within a class, yet the principle applies with undiminished force to the case at bar. This is apparent when it is remembered that it is the act with which the law is concerned, rather than the business in which one may be engaged when he commits it. It is the law that stands at the bar of this court for judgment; not the respondent. To sustain § 7, it must be measured by the general welfare clauses of the charter hereinbefore quoted, and when so graduated it cannot meet the test. It makes the act of one engaged in a particular business criminal, while the same act committed by another in a different business may go unchallenged by the city. If the respondent is guilty, those aggrieved must resort to the general law of the state for a remedy. Subd. 5 of § 59 can have no application here. The only question open under § 7 is whether, in the exercise

of its authority, the city has gone beyond the reasonable and constitutional limit of police regulation. We decide that it has done so.

The judgment of the lower court is affirmed.

FULLERTON, MOUNT, and DUNBAR, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

[No. 7422. Decided January 4, 1909.]

UNITED STATES FIDELITY & GUARANTY COMPANY, *Respondent*, AARON HOLLENSHEAD, *Appellant*, O. M. LEE, *Defendant*, FIRST NATIONAL BANK OF RITZVILLE, *Garnishee Defendant*.[1]

EXEMPTIONS—WAIVER—TIME FOR CLAIMING—GARNISHMENT. A claim of a personal property exemption from moneys garnished to satisfy a judgment must be made within a reasonable time, in the absence of statutory limitation, and is waived where the debtor had notice of the issuance of the execution and garnishment and made no answer to the garnishment, nor any claim to the exemption until after trial in the garnishment proceedings and announcement of the judgment against the garnishee; since Bal. Code, § 5410, makes it the duty of the defendant to controvert the answer of the garnishee by setting up his every claim or demand, and a full disclosure is the burden upon him who claims as exempt, property levied upon or attached.

DUNBAR, J., dissents.

Appeal from a judgment of the superior court for Adams county, Zent, J., entered December 23, 1907, directing the payment of money in the registry of the court to a judgment creditor, upon disallowing a claim for exemptions. Affirmed.

O. R. Holcomb, for appellant.

Danson & Williams, for respondent.

[1]Reported in 98 Pac. 749.

CHADWICK, J.—From an order directing payment of money, claimed to be exempt, in satisfaction of a judgment, defendant appeals. After trial on the merits, judgment was entered for plaintiff and against defendant, in a suit to recover money upon contract. On the same day and after the trial on the merits, judgment for the sum of $589.41 was entered against the First National Bank of Ritzville, Washington, in a garnishment proceeding ancillary to the main action. Defendants and the garnishee defendant were represented by the same attorney in all proceedings prior to the rendition of the judgment. The trials being concluded on the 7th day of June, the court announced its judgment in each case, but they were not formally entered until the 10th day of June, 1907. On the day prior to the formal entry of the judgments, defendant Hollenshead made and filed a claim for exemptions, in the following form:

"State of Washington, County of Adams, ss.

"I Aaron Hollenshead, one of the above named defendants, being first duly sworn, on oath do depose and say that the judgment in the above entitled action was obtained against myself, as one of the defendants, in the sum of $——, on this 7th day of June, 1907, that I am a householder, residing in the town of Ritzville, Adams County, Washington, that the family consists of myself and wife, that I am possessed of household goods, utensils and furniture, not equal in value to the sum of $500; that the same are exempt from attachment and execution, that I am entitled to an exemption, under the statute, to a further exemption in the sum of $250 coin, in value; that the above named plaintiffs have recovered judgment against the First National Bank of Ritzville, Washington, garnishee defendant, in the sum of $589.41, in the above entitled action, that I am entitled to the sum of $250 in lieu of cows, calves, swine, bees, fowls, and feed therefor, which I do not own or possess, out of the moneys which the said First National Bank of Ritzville now have in their possession and from which the said judgment stands against."

Execution having issued, the garnishee defendant paid the amount found to be due from it to appellant into the

registry of the court, and thereafter upon motion the court ordered the money paid over to plaintiff in satisfaction of its judgment. Upon these proceedings defendant predicates error, and insists that, under the liberal rules adopted by this court in construing exemption statutes, the money should have been paid over to him as exempt. However, we believe that the rule relied upon by appellant cannot be invoked until a claim has been made at the proper time and in a proper manner.

The law is solicitous for the welfare of the debtor, but it also recognizes the rights of the creditor to fully satisfy his judgment out of the property of the debtor that is not exempt from execution. The right to claim property in lieu of other property specifically exempted by statute is a privilege, and will be waived unless asserted at the time and in the manner expressly or impliedly required by the law. 12 Am. & Eng. Ency. Law (2d ed.), 198. To the end that this privilege may be preserved, the legislature has provided a method whereby the rights of the debtor may be fully protected and at the same time insures to the creditor a complete uncovering of the debtor's property, that he may know whereof he may take to satisfy his demand. Bal. Code, § 5255 (P. C. § 848). While in garnishment proceedings this method could not be held to be exclusive, yet if the debtor adopts it, nothing short of substantial compliance will avail. Exemption statutes have been passed in aid of the debtor who is willing to demonstrate his sincerity and good faith, and it would be manifestly wrong for a court, under the rule of liberal construction, to permit him to use the law to shield his exempt property and at the same time cover up that which should be forthcoming to satisfy the debt. A full disclosure is the burden put upon him who would claim as exempt property levied upon or attached under due process. Waples, Hd. & Ex., p. 776.

The claim relied upon in this case in no way met the intent and spirit of the law. Appellant, after the issuance

of execution, made claims that were probably sufficient in form, thus raising the question whether they were seasonably made. The statute of this state makes no suggestion of the proper time to claim exemptions when exempt property is made the subject of garnishment. In the absence of a statute, this court has held the rule to be that the claim of personal exemption shall be made within a reasonable time, and said that a claim made at any time before sale comes within the rule. This rule cannot be held to apply here, for there is no sale. On the contrary, the effect of a judgment is to put the parties in the same position they would be in had the sheriff made a sale of personal property and paid the proceeds into the registry of the court to be applied in satisfaction of the judgment. A garnishment is a proceeding *in rem*. The property is *in custodia legis*. To obtain the property, and not a personal judgment against the garnishee defendant, is the primary object sought to be attained; and where the defendant has notice, as he had in this case, he should be bound to avail himself of the privilege of answering and setting up his every claim or demand, (Bal. Code, §5410; P. C. §563), to the end that the court shall not render an improvident judgment.

In the case of *New Mexico Nat. Bank v. Brooks*, 9 N. M. 113, 49 Pac. 947, upon facts almost identical with the showing in this case, the court said, speaking of the defendant, that

"He had full notice of the garnishment proceedings, and procured his counsel to prepare and draw the answer for the garnishee, and refused to assert his exemption claim, and then for more than three months after the final judgment against the garnishee, neglected to make any claim of his privilege of exemption. We are of opinion that the principle is well established upon reason and authority that, under statutes similar to our own, a final judgment in favor of the plaintiff and against the garnishee, after notice to the defendant of the garnishment proceeding, in whatsoever way obtained by him, and his failure, neglect, or refusal to

assert his personal privilege of the right of exemption seasonably is *res adjudicata.*"

It may be added that the statutes of New Mexico, like our own, do not require any service upon or notice to the principal defendant of the garnishment proceeding. The rule that the principal defendant is bound to act before judgment is entered, if he has notice, is further sustained by the following authorities: Waples, Attachments, 737; 18 Cyc. 1476; *Randolph v. Little*, 62 Ala. 396; *State ex rel. Madison v. Judge*, 39 La. Ann. 622.

While we do not wish to be understood as holding that a claim for exemption would be lost where judgment is rendered without notice, yet it is the policy of the law to discourage, rather than encourage, litigation, and when actual notice comes to the debtor, he must act promptly and in a proper way or forfeit the favor of the law.

The judgment of the lower court is affirmed.

HADLEY, C. J., RUDKIN, FULLERTON, CROW, and MOUNT, JJ., concur.

DUNBAR, J., dissents.

[No. 7403. Decided January 4, 1909.]

SABINA SMITH, *Appellant*, v. ROLAND L. SCOTT, *Respondent*.[1]

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED. A plaintiff seeking to recover title to land alleged to have been held in trust for her by her deceased daughter is prohibited from testifying to any transaction had with, or statements made to, the deceased explanatory of plaintiff's method of bookkeeping where it appears that plaintiff meant to assert that entries represented payments on the purchase price of the land.

APPEAL—REVIEW—HARMLESS ERROR. Error in admitting evidence in a case triable *de novo* on appeal is harmless.

[1]Reported in 98 Pac. 763.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 7, 1908, upon findings in favor of the defendant, after a trial before the court without a jury, in an action to quiet title. Affirmed.

Sayre & Sutherland, for appellant.

Martin J. Lund, for respondent.

FULLERTON, J.—In this action the appellant sought to have herself adjudged to be the owner of certain real property, situated in the city of Seattle. The property in question was deeded on May 6, 1905, to the appellant's daughter, by its then owners, for a consideration of $335, the daughter being then the wife of the respondent. The daughter died about a year later, leaving a will in which she devised the property to her husband. The appellant contended that the property was purchased by her daughter for the appellant's use and benefit, in part with money which she had theretofore put in her daughter's hands for that purpose, and in part with money which her daughter and the respondent advanced to her use, and which she afterwards repaid them. The respondent contended that the property was paid for entirely with the community funds of himself and his wife; that, while the property was purchased for the purpose of furnishing a home for the appellant, it being the intention of himself and wife to let her live on the property without paying rent in any form as long as she desired, it was not intended that she should own it, and no money belonging to the appellant entered into its purchase price. On these issues the case was tried as a case of equitable cognizance in the court below, and resulted in a judgment in favor of the respondent.

The appellant complains that the court erred in the exclusion and admission of evidence. The respondent defended as deriving title in part from his deceased wife, and the court ruled that the appellant was prohibited from test-

ifying to any transaction she had with the wife, or as to any statement made to her by the wife, relating to the matter in issue. The appellant seems not to dispute the correctness of the rule thus announced by the court, but complains rather that it was applied with undue strictness, whereby certain explanatory statements the appellant was entitled to make concerning her method of bookkeeping were excluded. But we think the court went as far in this direction as the rule permits. The bookkeeping entries are in evidence, and there is no doubt that the appellant meant to assert that they represented payments made by her to her daughter to be applied on the purchase price of the property in question, and this is all that the appellant now claims for them.

The contention that improper evidence was admitted is material only in so far as it is allowed to control the judgment. It is not error requiring reversal, or error requiring that the judgment for the one party be set aside and a judgment entered for the other, to admit incompetent evidence in a cause tried by the court without a jury. This court in reviewing the case will ignore the incompetent evidence, and affirm the judgment only when we find it sustained by a preponderance of the competent evidence.

The principal contention is over the weight of the evidence. The appellant contends that it lies with her, and that the trial court erred in holding that she was not entitled to recover. But after a study of the entire case, we are not convinced that the trial court was wrong. Indeed, on the face of the record we feel that the competent evidence decidedly preponderates with the respondent, and since the trial judge, who had the witnesses before him, so decided, we will not disturb the judgment.

The judgment should be affirmed, and it will be so ordered.

HADLEY, C. J., CROW, CHADWICK, MOUNT, and DUNBAR, JJ., concur.

[No. 7490. Decided January 4, 1909.]

INEZ GOERIG (*now* INEZ HARNED), *Appellant*, v. LAURENCE H. GOERIG, *Respondent*.[1]

DIVORCE—CUSTODY OF MINOR CHILD. The modification of a divorce decree respecting the custody of a child, whereby the same is awarded to the father during the school period of the year, and to the mother during vacation, will not be disturbed on appeal upon conflicting evidence, where neither parent appears to be an improper person to have such custody, and the order appears the most fitting that could be made.

Appeals from an order of the superior court for King county, Frater, J., entered February 4, 1908, modifying a judgment respecting the custody of the minor child of the parties. Affirmed.

Gay, Bailey & Rummens, for appellant.

Aust & Terhune, for respondent.

FULLERTON, J.—The respondent and appellant were formerly husband and wife, at which time there was born to them a girl child, who is the subject of this controversy. The parties were divorced by a decree of the superior court of King county, entered on February 17, 1905. At that time the child was in her seventh year, and her custody was awarded to one O. R. Oliver, a brother of the mother, to be placed by him in the House of the Good Shepherd, in the city of Seattle, there to be reared and educated at the expense of the father. On March 16, 1906, there was a modification of this decree to the extent that the place for keeping the child was changed, and the parents were allowed to take the child to their respective homes for brief periods of time. This is an application by the father for a further modification of the decree respecting the custody of the child. He asks that he be awarded its sole care and custody,

[1]Reported in 98 Pac. 742.

averring as grounds therefor his own fitness to have its care and custody, the unfitness of the mother, and that the present mode of keeping the child entails upon him a large and needless expense.

The mother answered, denying the allegation of the respondent's petition, and filed a cross-petition in which she asked that the custody of the child be awarded to her. A reply was filed denying the allegations of the cross-petition, and on these issues a hearing was had, which resulted in a further modification of the decree to the effect that the child be awarded to the father during the school season of the year, and to the mother during the vacation period. Both parties ask to have the decree modified.

At the hearing the evidence was allowed to take a wide range. The conduct of each party, as viewed through the eyes of the other and through the eyes of that other's partisans and friends, was exposed and laid bare before the court. The story thus unfolded is not an edifying one, and it would serve no useful purpose to enter upon its review in this opinion; but we do not think, even were we to accept all of these evidently exaggerated tales as strictly true, that either parent has established that the other is an unfit person to have the custody of this offspring of their unfortunate union. The evidence makes it plain that this method of caring for the child, that the constant association brought about by the necessity of carrying the child from the one home to the other, is uncongenial to the parties, but it is a situation they have brought upon themselves, and by themselves it must be borne. Should the order, in the future, when carried out in its intent and spirit, prove detrimental to the child, or should it prove that either of the parents refuses to accept the situation as it is, or refuses to act in good faith towards the other, and that such conduct affects the welfare of the child, then the court will be justified in taking it entirely from the one that is most blamable and

give its sole custody to the other. But as we view the record now, we think that the order as it stands is the most fitting that could have been made, and we direct that it be affirmed.

CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7696. Decided January 5. 1909.]

C. F. MORGAN, *Respondent*, v. RAINIER BEACH LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—PROMISE TO REPAIR—CONDITIONAL PROMISE. The promise by the owner of a logging road, on the complaint of one employed as a locomotive engineer, to repair the railroad track at a dangerous curve as soon as its section boss returned, which would be in a "few days," relieves the servant of the assumption of risks, where, in less than a week, the want of repairs caused an accident before such return; there being no distinction between an unconditional promise to repair and one to repair after a definite date or event, where the accident happens before such date or event.

SAME—RIGHT TO RELY ON PROMISE—QUESTION FOR JURY. Whether a defect in a railroad track is so bad and apparent that no prudent servant would use the same in reliance upon a promise to repair, is for the jury, unless the evidence leaves room for no two opinions on the subject.

TRIAL—PROVINCE OF JURY. The determination of the preponderance of conflicting evidence is for the jury, and not the appellate court.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 9, 1908, upon the verdict of a jury rendered in favor of a locomotive engineer for personal injuries sustained in the derailment of his engine. Affirmed.

R. S. Eskridge and *Philip Tindall*, for appellant.

Jackson Silbaugh, for respondent.

[1]Reported in 98 Pac. 1120.

FULLERTON, J.—The respondent brought this action to recover for personal injuries received by him while in the employment of the appellant as a locomotive engineer. The appellant at the time of the injury was engaged in the business of logging and manufacturing lumber, and owned and operated as a part of its equipment a logging road, some two miles in length, having one terminal at Lake Washington, in King county, and the other in the timber towards the east. Midway between the terminals of the road was a switch-back, formed by two switches some eight hundred feet apart. In going towards the Lake terminal, after passing the first switch, the road descended at a five or six per cent grade for about six hundred feet, when it made a sharp curve to the left and ascended a steep grade to the second switch. In order to ascend this last grade with a loaded train, it was necessary that the train have considerable momentum, and it was customary for the engineer to pass the curve at a speed of about twelve miles an hour. At the time the respondent was injured, he was bringing a train-load of logs from the timber to the lake. After leaving the first switch, the train passed down the grade in safety and at its usual speed; but when it reached the curve at the bottom of the grade, the rails spread under the engine, causing it to leave the track and turn over. In turning over, the engine caught the respondent, breaking his leg between the knee and the ankle, being the injury for which he sues.

It was shown, that the track was out of repair at the place of the accident; that the engine had left the track at that point once before when driven by another engineer; and that shortly before the accident a car had left the track at this, as well as another, point on the road because of the defective condition of the track. The respondent's evidence further tended to show, and the jury were warranted in finding, that when the car was being replaced at the latter place, which was less than a week before the accident, the respondent complained to the appellant's foreman of the

defective condition of the track generally, and the place where the accident occurred particularly, telling him that the track was in need of repair, especially at the latter place. In the same connection he also complained of the condition of the engine, saying that the brakes did not work properly. The foreman answered by saying that the section boss who had charge of the roadbed was away, but would return in a few days when the track would be gone over and put in first-class condition; that, as to the engine, the company had ordered a new one, which was then due to arrive, and as the old would be discarded on the arrival of the new one, the company did not feel justified in expending anything more in the repair of the old one. The appellant relied on these assurances and kept on with his work, when he met with the accident as above recited. At that time the section boss had not returned, nor had any attempt been made to repair the track. At the trial judgment went for the respondent for $2,500, and this appeal was taken therefrom.

But one contention is made for reversal, namely, that the evidence was insufficient to sustain the verdict and judgment. The appellant concedes the general rule that, when the master, or some one acting in his place and by his authority, promises to remedy a defect in the place in which, or the instrument with which, he requires his servant to work, on the complaint of the servant, the servant does not, by continuing in the employment, assume the risk of injury from the defect; but contends that there is no room under the facts shown in this case for the application of the doctrine. Counsel argue that the promise was not to repair immediately or within a reasonable time from the making of the promise, but was to repair within a reasonable time after the return of the section boss, which confessedly was not to occur until after a "few days" from the time the promise was made, and actually did not occur before the happening of the accident, and consequently the agreement to repair evidenced by the promise never became operative.

The authorities are not agreed as to the principle on which the liability of the master rests in this class of cases, yet all of the modern cases agree that where a servant makes a complaint to his master of a dangerous defect in his place of work, or in the appliances furnished him with which to work, and the master makes an unconditional promise to repair the defect, the risk of the defect is cast upon the master until such time as would preclude all reasonable expectation that the promise might be kept, unless the danger from the defect is so imminent that no person of ordinary prudence would risk injury from it. *Crooker v. Pacific Lounge & Mattress Co.*, 29 Wash. 30, 69 Pac. 359; *Shea v. Seattle Lumber Co.*, 47 Wash. 70, 91 Pac. 623; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; 26 Cyc. 1209, and cases there collected.

But on whatever ground the liability may be assumed to rest, there can be no distinction in principle, in so far as the liability of the master is concerned, between an unconditional promise to repair, and a promise to repair on or after a certain date or after the happening of a particular event. The failure to repair after being so requested by the servant puts the master in the wrong. To fail to furnish his servant with a reasonably safe place in which, or a reasonably safe appliance with which, to work is a violation of a duty imposed on the master by law. The delay in making the repairs is for his benefit, not that of the servant, and the time within which it will be made is wholly within his control. If, therefore, he chooses for his own convenience to induce his servant to work in a defective place or work with a defective instrument, his liability must be the same whether he fixes a definite time when he will remove the danger or whether he leaves that time indefinite.

The cases cited by the appellant to maintain the contrary doctrine are *Standard Oil Co. v. Helmick*, 148 Ind. 457, 47 N. E. 14; *Albrecht v. Chicago & Northwestern R. Co.*, 108 Wis. 530, 84 N. W. 882, 53 L. R. A. 653; and *Rice v.*

Eureka Paper Co., 70 App. Div. 336, 75 N. Y. Supp. 49. The first and last of these cases do maintain the principle contended for, but the first was overruled by the Supreme Court of Indiana in the subsequent case of *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465, the court using this language:

"The case of *Standard Oil Co. v. Helmick*, 148 Ind. 457, is urged upon our consideration as holding a contrary view. It should be noted that the question in that case related to the use of an ordinary crank, applied in the usual way to a square shank on the end of a shaft which revolved a machine in the occasional discharge of candles. The defect complained of was the worn condition of the shank, which had been brought about gradually by friction in the use of the crank. The plaintiff put on the crank, and, while engaged in turning the machine, the crank slipped off, and precipitated him against a platform, whereby he was injured. The court assigned the *Helmick* case to that class to which *Meador v. Lake Shore etc. R. Co.*, 138 Ind. 290; *Jenney etc. Co. v. Murphy*, 115 Ind. 566, and *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56, belong, which hold that in the use of simple implements and devices a promise to repair is not available as a defense. What was there said, contrary to the view herein expressed, was unnecessary to a decision of the case, and cannot be accepted as authority in the case at bar. Some expressions in *Burns v. Windfall Mfg. Co.*, 146 Ind. 261, and probably other of our cases may appear in conflict, but we are satisfied that the better reasons and a decided weight of authority support the law as above stated."

The case from the supreme court of New York was reversed by the court of appeals in 174 N. Y. 385, 66 N. E. 979, 62 L. R. A. 611; that court holding that the promise which the supreme court held to be a promise to repair at a fixed time was in fact a promise to repair generally without limitation as to time. The Wisconsin case, while not directly parallel as to its facts, may be said to support the appellant.

But the Wisconsin case, if it does not stand alone, is against the great weight of authority. The general rule is that the master, when he promises to repair a defect at a definite and agreed time, takes upon himself the risk from the time of the making of the promise up to and including the expiration of the time specified for its fulfillment. In *McFarlan Carriage Co. v. Potter, supra*, the servant was injured by a defective saw and saw table, which the master had promised to repair "as soon as the job of work that said company was then working on was completed." The servant was injured before the job was completed, and it was argued there, as here, that the time for the execution of the promise had not then arrived. The court held the master liable, using this language in its opinion:

"A promise to repair is confession to a breach of duty, and when a master, to right himself, requests and induces a postponement, either for convenience or profit, no principle of justice will lay the burden of delay upon the unoffending servant. The whole question is bottomed upon the wrong of the master, and it is sophistry to argue that the servant, by confiding in the master's promise, for a reasonable time in which to cure the defects, clearly obvious though they be, should be chargeable with having waived the master's duty to him, and assumed the additional risk himself.. . . . It is also insisted that the complaint is bad because it shows that the plaintiff's injury was received before the job was completed, and before the time for execution of the promise had arrived, the insistence being that the promise to repair, as made, did not begin to operate until the job was completed, and that the shielding period was the reasonable time the plaintiff might rely upon the performance of the promise after the completion of the job. We cannot approve this view. We perceive no sound reason, and none has been suggested, for holding that such a promise has no force till the time arrives for its execution, and that it does not become effective until after it is broken. It is clear, and the view has the support of an overwhelming weight of authority, that a promise to repair is at its best the moment it is made and acted upon."

In *Greene v. Minneapolis & St. Louis R. Co.*, 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785, the servant, a locomotive engineer, had complained to the master of a defect in the engine which he was required to operate, and was promised that it would be repaired at the end of the next trip. Before the end of the trip the servant was injured while operating the defective engine, and by reason of the defect. It was held that the servant could recover. Discussing the effect of the promise, the court said:

"If a servant, before he enters a service, knows, or afterwards discovers, that the instrumentalities furnished for his use are defective, and understands, or by exercise of ordinary observation ought to understand, the risks to which he is thereby exposed, and if, notwithstanding such knowledge, he, without objection, and without any promise on the part of the employer that such defects will be remedied, enters or continues in such service, he cannot recover for injuries resulting therefrom, but will be deemed to have assumed all the risks of the employment thus known.

"But it is now almost equally well settled that if a servant who has knowledge of defects in the instrumentalities furnished for his use, gives notice thereof to his employer, who thereupon promises that they shall be remedied, the servant may recover for an injury caused thereby, at least where the master requested him to continue in the service, and the injury occurred within the time at which the defects were promised to be remedied, and where the instrumentality, although defective, was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it. . . .

"Courts also differ as to the ground upon which this should be placed. Some place it upon grounds of policy and justice—upon a consideration of the unequal situation of master and servant; others, upon the ground that, in such cases, the facts rebut the presumption of a waiver on the part of the servant; others, upon the ground of a contract on the part of the employer, implied from the facts, that if the servant continues in the service in the meantime, and until the defects are remedied, the employer and not the servant will assume the risks. We will not attempt to determine

which of these is the best or most logical reason for the rule, except to say that the last seems to us very forcible, especially where there is a request to the servant to continue in the service. It is sufficient for us that the rule has generally commended itself to the judicial mind (as it does to us) as founded in sound policy and common justice. If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant and not his own, when, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use, under a promise thereafter to repair it."

In the case of *Roux v. Blodgett & Davis Lumber Co.*, 85 Mich. 519, 48 N. W. 1092, 24 Am. St. 102, the servant was employed in the master's sawmill. He was working close to bevelled gear wheels, which up to the day preceding the accident had been covered. On the day preceding the accident the covering became broken, and at night the servant called the master's attention to the fact. When the servant reached the mill on the morning of the accident he saw that the defect had not been remedied, and again called the master's attention to it. The master promised to repair it at the noon hour, telling the servant to take care of himself until that hour. Before the noon hour, the servant's clothing caught in the exposed gearing, and his leg was drawn therein and crushed. On appeal from a judgment in his favor, the court said:

"It is urged that plaintiff's knowledge of the exposed and dangerous condition of this gearing was equal to that of his employers, and by continuing his work he assumed the risk. This rule of law is not applicable to the circumstances of the present case. The risk to which plaintiff was exposed on the day of the injury was not ordinarily incident to his employment. The danger was not one existing at the time of his engagement. It was a temporary peril. It did not arise until the day before the injury. In view of the danger this very machinery had been covered up. Plaintiff, acting as a prudent man should, had, on the evening before, and

again on the very morning of the accident, notified defendant of the fact that the gearing was exposed, and defendant had, in recognition of the danger, and of plaintiff's exposure thereto, promised to replace the covering, and instructed the plaintiff to continue his work until noon, when it should be done. There was no voluntary assumption of the risk on the part of the plaintiff. He proceeded under protest. It was defendant's bounden duty, when notified, to re-cover this gearing. It was postponed to suit defendant's convenience, and not that of the plaintiff."

Other cases to the same effect are the following: *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521; *Louisville Hotel Co. v. Kaltenbrun*, 26 Ky. Law 208, 80 S. W. 1163; *King-Ryder Lumber Co. v. Cochran*, 71 Ark. 55, 70 S. W. 606; *Cudahy Packing Co. v. Skoumal*, 125 Fed. 470.

In *Andrecsik v. New Jersey Tube Co.*, 73 N. J. L. 664, 63 Atl. 719, 4 L. R. A. (N. S.) 1913, it appeared that a servant in charge of a machine in his master's mill discovered a defect in the machine some time prior to ten o'clock in the morning, and at that hour complained to the superintendent concerning it. The superintendent, in answer to the complaint, said to him: "You go right ahead with the work; we are overloaded with work, and at the noon hour I will fix this for you." The servant worked until the noon hour without injury. The defect was not remedied at the noon hour, and the servant went to work with the machine without further complaint, knowing that the defect had not been repaired, and was injured at three o'clock that afternoon. The court held he could not recover; that the effect of the promise was to cast upon the master the liability from the time of the promise to the time he agreed to make the repairs, but not having made them at the time agreed upon to the knowledge of the servant, the risk of injury thereafter was assumed by the servant.

The same doctrine was announced by the supreme judicial court of Maine in the case of *Dempsey v. Sawyer*, 95 Me. 295, 49 Atl. 1035. In the case at bar the respondent was

injured prior to the return of the section boss, and prior to the time it was indicated by the master that he would return. These cases therefore support the rule contended for by the respondent, since the time in which the repairs were to be made had not yet arrived. Whether the rule announced by them to the effect that the liability for the defect terminates at the expiration of the time fixed, if the repairs are not then made, is or is not sound, we need not here determine, but it is probable that this rule, like many others pertaining to this class of cases, must be governed largely by the circumstances. Since defects such as was complained of in the case at bar could not have been repaired at an instant, or perhaps without several days' labor, it would be much more rational to hold that the liability continued until such reasonable time after the section boss' return as it would take to make the repairs. But be this as it may, we are clear that the appellant, by promising to repair the defects in the track on the return of the section boss, took upon itself the liability for any injury to the respondent arising from the defect between the time of making the promise and the time fixed for the section boss' return; and as the injury to the respondent happened between those dates, it was liable to respond in damages for that injury.

It is next said that the appellant is excused from liability for the reason that the track was so notoriously bad, and the danger of the accident from derailment so apparent and obvious, that no person of ordinary intelligence and prudence would have incurred the risk. But we do not think the evidence upon this question was so definite as to leave no room for two opinions, and unless it was thus definite, the question was for the jury. The court rightly submitted it to them.

Whether the respondent operated the train in a dangerous manner and contrary to the orders of the appellant, and whether this manner of operating the train contributed to his injury, were likewise questions of fact for the jury. The evidence being in conflict upon these questions, the right to

determine its preponderance was with the jury; the right does not rest with the appellate court.

The judgment is affirmed.

MOUNT, CROW, and RUDKIN, JJ., concur.

HADLEY, C. J., DUNBAR, and CHADWICK, JJ., took no part.

[No. 7281. Decided January 5, 1909.]

R. J. FLICK *et al.*, *Respondents*, v. C. V. SHOWALTER *et al.*, *Appellants*.[1]

APPEAL—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY—REDUCTION BY AMENDMENT. The supreme court has no jurisdiction of an appeal in an action at law for the recovery of money, where on the trial the complaint was amended so as to reduce the amount claimed to less than $200.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered January 4, 1908, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action on contract. Appeal dismissed.

Jesseph & Grinstead, for appellants.

R. A. Thayer and *John S. Anderson*, for respondents.

PER CURIAM.—Action by R. J. Flick and H. B. Purcelle against C. V. Showalter and Nellie Showalter, his wife, to recover a real estate broker's commission. From a judgment in favor of the plaintiffs for $105 and costs, the defendants have appealed.

The respondents have moved to dismiss the appeal, contending that this is an action at law in which the original amount in controversy does not exceed the sum of $200, and that this court has no jurisdiction. The complaint as originally drawn demanded judgment in the sum of $225 and costs,

[1]Reported in 99 Pac. 9.

on the theory that the respondents were entitled to a commission of 5 per cent on $4,500. On the trial the complaint was so amended as to demand only $105, or two and one-half per cent commission on $4,200. There was no contest as to the amount of the recovery, the only issue being whether the appellants were liable for any sum whatever. The record shows that the trial was had and the final judgment was entered on the complaint as thus amended. After the amendment had been made, the complaint would not have sustained a judgment for any sum in excess of $105. The amount in controversy therefore does not exceed $200, and this court has no jurisdiction.

The appeal is dismissed.

[No. 6524. Decided January 5, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Cascade Railroad Company et al., Plaintiff*, v. THE SUPERIOR COURT FOR SKAMANIA COUNTY *et al., Respondents.*[1]

COMMERCE—MONOPOLIES—RAILROADS—COMPETING PARALLEL LINES—AGREEMENT TO BUILD NEW ROAD—RESTRAINT OF TRADE. The constitutional and statutory prohibitions against the consolidation of parallel and competing transportation lines are not violated by an arrangement between two railroad companies operating competing lines between Spokane and Seattle, Washington, whereby each subscribed for one-half of the capital stock of a new and distinct railroad corporation and contributed one-half of the cost of constructing a new railroad from Spokane to Portland, Oregon, opening up and serving new territory, each road continuing its individual identity and control.

EMINENT DOMAIN—PARTIES ENTITLED—SUBSCRIPTION OF STOCK—VALIDITY—TRUSTEE FOR OTHER RAILROADS. A subscription to the capital stock of a railroad corporation by a trustee in behalf of two other railroad companies, each of which was the owner of the beneficial interest in one-half of such stock, is sufficient to confer upon the new corporation the right of eminent domain, where the new company was to serve new territory.

[1]Reported in 98 Pac. 739.

Certiorari to review a judgment of the superior court for Skamania county, McCredie, J., entered October 4, 1906, adjudging a public use, in condemnation proceedings for a railroad right of way, after a trial before the court. Affirmed.

W. W. Cotton, Arthur C. Spencer, and *Ralph E. Moody,* for relator. In construing anti-trust statutes, the nature of the business contemplated by the contract, and the tendency of the contract as affecting the public, rather than the parties to the contract, whether corporations or individuals, are to be considered in determining whether it violates public policy. *Yazoo & M. V. R. Co. v. Searles,* 85 Miss. 520, 37 South. 939, 68 L. R. A. 715; *Earle v. Seattle etc. R. Co.,* 56 Fed. 909; *Northern Securities Co. v. United States,* 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *Phillips v. Iola Portland Cement,* 125 Fed. 593. The phrase "a parallel or competing line," includes a projected but not wholly constructed road, if such road when completed and in operation will actually compete with the road seeking control before completion. Noyes, Interstate Corporations, § 37, p. 64; *Pennsylvania R. Co. v. Commonwealth* (Pa. St.), 7 Atl. 368; *Illinois State Trust Co. v. St. Louis etc. R. Co.,* 208 Ill. 419, 70 N. E. 357. The respondent railroad was organized in a manner and for a purpose prohibited by the constitution and laws of the state of Washington and Congress, and is void *ab initio,* and therefore, no proceeding can be maintained by the respondent, particularly for the purpose of carrying out the purpose of its wrongful existence. *Illinois State Trust Co. v. St. Louis etc. R. Co., supra; East St. Louis Connecting R. Co. v. Jarvis,* 92 Fed. 735; *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Brown v. Estate of Dibble,* 65 Mich. 520; *Ford v. Chicago Milk Shippers' Ass'n,* 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298; *State ex rel. Morrell v. Superior Court,* 33 Wash. 542, 74 Pac. 686.

Carey & Kerr, for respondents.

Crow, J.—In June, 1906, the Portland & Seattle Railway Company, a corporation, filed its petition in the superior court of Skamania county, against the Cascade Railroad Company, a corporation, New York Trust Company, a corporation, and the Oregon Railroad & Navigation Company, a corporation, and others, as defendants, to condemn and appropriate a right of way over certain real estate. After the entry of the preliminary decree adjudging a public use, the above-named defendants, as relators, applied to this court for a writ of certiorari, and the writ having been issued, the decree is now before us for review.

On the preliminary hearing, the superior court found that the Portland & Seattle Railway Company was a duly organized corporation, that its capital stock had been regularly subscribed, that it possessed the power of eminent domain, and that the attempted use for which it sought to appropriate the land was public. From the evidence it appears that 49,995 of the 50,000 shares of capital stock of the Portland & Seattle Railway Company were subscribed by C. M. Levey, trustee; that he was president of the company; that he had been instructed to have the company incorporated and to subscribe for the stock as an enterprise in which the Northern Pacific Railway Company and the Great Northern Railway Company were to become jointly interested as stockholders; that he received such instructions from the president of the Northern Pacific Railway Company, of which company Levey himself was third vice president; that the Northern Pacific Railway Company is a Wisconsin corporation, while the Great Northern Railway Company is a Minnesota corporation; that the Northern Pacific Railway Company and the Great Northern Railway Company were the beneficial owners of the 49,995 shares of stock so subscribed by C. M. Levey, trustee, each owning one-half thereof; and that the Northern Pacific Railway Company and the Great Northern Railway Company contributed the necessary funds for the construction of the Portland & Seattle

Railway Company, under a construction contract into which it had entered with contractors Seims & Shields.

The relators, citing §§ 14, 16, and 22, of art. 12 of our state constitution, and the act of Congress of July 2, 1890, entitled: "An act to promote trade and commerce against unlawful restraints and monopolies" (26 Stats. at Large, 209), commonly known as the 'Anti-Trust Act'," contend that, by the organization and construction of the Portland & Seattle Railway Company in the manner above mentioned, that company, the Northern Pacific Railway Company, and the Great Northern Railway Company have violated the above mentioned sections of the constitution of the state, and also the anti-trust law, and that the Portland & Seattle Railway Company should not be permitted to proceed with the condemnation proceedings, the subscription to its capital stock being unlawful.

It is admitted by the respondents that the Northern Pacific Railway Company owns and operates a line of railway from Spokane to Seattle, that the Great Northern Railway Company owns and operates a line of railway between the same points, that those two companies were instrumental in causing the respondent road to be incorporated, and that each of them owns one-half of its capital stock; but the respondents contend that these facts do not amount to a consolidation of the Northern Pacific Railway Company and the Great Northern Railway Company, and we think this contention should be sustained. It is not disputed but that the respective officers of the Northern Pacific Railway Company and the Great Northern Railway Company remain the same as before the organization of the Portland & Seattle Railway Company. Each corporation is unhampered by the other in the matter of the transaction of its business, the making of rates, and the transporting of freight and passengers over its own line as heretofore. The two original companies remain intact and are conducted as separate and distinct corporations entirely independent, the one from the other. The

mere fact that they each have subscribed for and own stock in the respondent road, which is a new and distinct entity, does not merge or consolidate them in violation of the state constitution or the anti-trust law.

The constitutional and statutory prohibitions against the consolidation of parallel and competing transportation lines are founded upon principles of public policy, the intention being to preserve to the public existing facilities offered by competing companies, so that their efficiency shall not be impaired by bringing them under a common ownership and control. It is difficult to understand how transportation facilities can be impaired when two existing separate and independent corporations, each of which continues its individual identity, organization, and control, subscribe for the capital stock of a newly created corporation and thereby aid in building a railroad which opens and serves additional territory. It would appear that the creation of the new corporation, instead of curtailing the transportation facilities already enjoyed by the public, would increase the same.

The relators, in support of their contention that an illegal combination has been formed, cite *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. In that case, however, the court held that it was illegal for the Northern Securities Company, a new corporation, to acquire and control the stock of both the Northern Pacific and Great Northern railway companies, which at the time were operating separate lines held to be parallel and competing. The ground upon which the decision rested was that the effect of the stock ownership by the Securities Company would be to stifle the competition which had theretofore existed between the two railroad companies.

The question before the trial court was whether the capital stock of the respondent company had been subscribed in compliance with Bal. Code, § 4250 (P. C. § 7053), so that it might be entitled to exercise the right of eminent domain. The trial court found that such subscription had been legally made,

and in so doing it committed no error. The judgment is affirmed.

HADLEY, C. J., FULLERTON, and MOUNT, JJ., concur.

RUDKIN and CHADWICK, JJ., took no part.

[No. 7342. Decided January 5, 1909.]

FRANK A. MAXWELL *et al.*, *Respondents*, v. DICK HARPER *et al.*, *Appellants*.[1]

DEEDS—DELIVERY—UPON DEATH OF GRANTOR—CONSTRUCTION—GIFTS—INTENT—EVIDENCE—SUFFICIENCY. There is a valid delivery of a deed where it is deposited with a bank to be held during the grantor's lifetime and delivered after death to the grantee, where it further appears that a clause in the deed so provided and appointed the bank the grantor's "agent" to make such delivery with the same force and effect as if delivered by the grantor during his lifetime, and it appears by extrinsic evidence that the grantor was seriously ill and under obligations to the grantee and desired to make the grantee a gift of the land, reserving only the rents and profits during his life, and after the delivery to the bank he had no control or dominion over the deed.

SAME—EVIDENCE—AMBIGUITY IN DEED. A deed delivered to a third party to be held during the lifetime of the grantor and delivered after death to the grantee, which so provides and appoints such third party the "agent" of the grantor to make such delivery, is so ambiguous as to admit of extrinsic evidence to show the intent of the grantor.

WITNESSES—COMPETENCY—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT. It is not incompetent, as a privileged communication between attorney and client, to show by the testimony of the attorney that the grantor in a deed employed him to effect a gift of the land to the grantee, reserving the rents and profits during the lifetime of the grantor, and for that purpose a deed was made and delivered to a third party specifying that it was to be held during the grantor's life and after death delivered to the grantee.

ESCROWS—DEEDS—GIFTS—RIGHTS OF GRANTEE—ACTS OF HOLDER. Where a deed was delivered to a third party to be held during the lifetime of the grantor and after death delivered to the grantee as

[1]Reported in 98 Pac. 756.

a gift, the mistaken belief of such third party that the deed was subject to the dominion and control of the grantor does not affect the rights of the grantee.

Same—Withdrawal—Intent of Grantor. The intent to vest title in a grantee by delivery of a deed to a third party to be delivered to the grantee upon the death of the grantor, cannot be changed by the grantor by withdrawing the deed without the consent of the grantee.

Same—Subsequent Mortgage by Donor. The fact that a grantor after deeding land as a gift by an unrecorded deed, mortgaged the same to an innocent mortgagee, does not affect the donee's title to the land, subject to the mortgage.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered April 15, 1908, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action to quiet title. Reversed.

Cain & Hurspool, for appellants.
M. M. Godman and *Will H. Fouts*, for respondents.

Crow, J.—Action by Frank A. Maxwell and others against Dick Harper and Laura Harper, his wife, to cancel and set aside a deed to land in Columbia county, and to quiet title. From a judgment in favor of the plaintiffs, the defendants have appealed.

The evidence shows, that one W. A. Maxwell, on October 22, 1906, executed a warranty deed for the land now in dispute, to the appellant Laura Harper, and delivered it to F. A. McMasters, cashier of the Dayton National Bank, of which he (Maxwell) was then president; that he had consulted with Mr. McMasters, who was an attorney, with a view to taking the necessary legal steps for giving the land to Laura Harper, but reserving the rents and profits to himself during his lifetime; that Mr. McMasters advised him that such a gift and transfer could be made by deed; that thereupon and for that purpose Maxwell requested McMasters to draw the deed; that with the design of expressing Maxwell's intent with regard to its delivery, but without explicit directions

from him as to the language to be used, McMasters inserted in the deed the following clause:

"This deed is to be held by the Dayton National Bank of Dayton, Washington, until time of death, and I hereby appoint said bank (acting through its officers) my agent to deliver this instrument to Laura Harper upon my death and that the said delivery may have the same force and effect as if delivered to her by me during my lifetime;"

that the deed was executed by W. A. Maxwell, and together with certain stock certificates, was delivered to Mr. McMasters as cashier of the bank without further instructions; that Mr. McMasters inclosed the deed and certificates in an envelope upon which he wrote the name of W. A. Maxwell, and placed them in a safe of the bank to which Maxwell did not have the combination; that Maxwell was at the time seriously ill; that his physician advised him he could do nothing further for him; that he was a bachelor; that for many years he had lived and made his home with the appellants, Dick Harper and Laura Harper, his wife, Dick Harper being his cousin; that he desired to retain the use of the land for himself during his life, but wished it to go to Mrs. Harper at his death; that he ceased to be president of the bank about two months after the date of the deed; that McMasters also ceased to be cashier, being succeeded by one Jackson; that the deed then in the bank was turned over to Jackson by McMasters; that shortly thereafter Jackson consulted Maxwell with regard to the deed; that Maxwell then told him to keep it; that Maxwell died on October 20, 1907; and that on October 23, 1907, Jackson delivered the deed to the appellant Laura Harper, who caused it to be recorded. The evidence further shows that, at or about the time W. A. Maxwell executed the deed, he also indorsed certain certificates of mining stock and bank stock to Laura Harper, and delivered them to McMasters, the indorsement on the bank stock reading as follows:

"For value received I hereby sell and transfer unto Laura Harper six shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint the cashier of said bank to deliver said stock to her upon my death; to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises.

"Dated October 22nd, 1906;"

that afterwards the Columbia National Bank of Dayton took over and succeeded to the business of the Dayton National Bank, and it then became necessary to transfer the bank stock above mentioned; that thereupon Jackson, the cashier, conferred with Maxwell in regard to such transfer, and was directed by him to erase the name of Laura Harper and insert that of another assignee; that this was done, the stock being sold and the proceeds placed to the credit of Maxwell in his bank account; that on September 28, 1907, Maxwell executed a lease of the land for two years to one Simmerman, who was then his tenant; that in April, 1907, he mortgaged the land to Baker & Baker for $5,000, and used the proceeds of the loan, but the evidence fails to show that Baker & Baker had any knowledge or notice of the execution and delivery of the deed, or that the appellant Laura Harper knew of or consented to the execution of the mortgage.

About September 1, 1907, after the sale of the bank stock and the execution of the mortgage, and while the deed remained in the bank, Maxwell had a conversation with Hardy E. Hamm, then his attorney, now his executor, to which conversation Mr. Hamm testified, and in which Maxwell stated that, owing to the change in the bank, he did not know whether the Columbia National Bank had authority to hold the deed, and then requested Mr. Hamm to investigate and attend to the matter so that the deed might be held, kept for, and delivered to Mrs. Harper upon his death. The deed was never in the possession of Maxwell after the date of its original execution, nor was it out of the custody of the bank until it was delivered to Mrs. Harper.

Maxwell died testate, and the plaintiffs Frank A. Maxwell and Richard E. Maxwell, Friend Isaac Maxwell, and Mary A. Simmerman, his brothers and sister, being his legatees, and Hardy E. Hamm as his executor, instituted this action to set aside the deed and quiet their title. They alleged, (1) fraud and undue influence on the part of the appellants in procuring the execution of the deed, and (2) that the deed was void for want of delivery. The claim of fraud and undue influence was entirely abandoned on the trial, no evidence being introduced to support the same, and the controlling question now before us is, whether the deed was void for want of delivery. The trial court found that W. A. Maxwell did not intend to vest in Laura Harper a present interest or estate; that he did not intend to, nor did he, part with dominion or control over the deed, and that he was the owner of the land at the time of his death.

From a careful examination of the evidence and the entire record we are compelled to conclude that the trial judge erred in making the above findings, and in his conclusions of law thereon. The question of the delivery or nondelivery of a deed is one that must be governed by the intent of the grantor. *Matson v. Johnson*, 48 Wash. 256, 93 Pac. 324. Such intent must be gathered from the terms of the deed itself, if it can be consistently done. If the language used is susceptible of more than one construction, that one must be adopted which militates most strongly against the interests of the grantor. Devlin, Deeds, § 848. If the deed upon its face appears to be uncertain or ambiguous, it may then be construed in the light of all the surrounding circumstances, evidence of such circumstances being admitted not to change, modify, or add to the terms of the written instrument, but to aid the court in arriving at a correct interpretation of its language, and ascertaining the true intent of the grantor. 1 Elliott, Evidence, § 584; *Carr v. Jones*, 29 Wash. 78, 69 Pac. 646; *Muir v. Westcott*, 34 Wash. 463, 75 Pac. 1107;

Citizens Bank of Emporia v. Brigham, 61 Kan. 727, 60 Pac. 754; *Brannan v. Mesick*, 10 Cal. 95.

A grantor's deposit of his deed with a third party, to be held by such third party until the grantor's death and then delivered to the grantee therein named, the grantor reserving no dominion or control over the deed during his lifetime, constitutes a valid delivery and vests an immediate estate in the grantee, subject to a life estate in the grantor. *Gridley v. Atkins*, 78 Conn. 380, 62 Atl. 337, 112 Am. St. 152, 4 L. R. A. (N. S.) 816; *Ball v. Foreman*, 37 Ohio St. 132; *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678; *Stout v. Rayl*, 146 Ind. 379, 45 N. E. 515; *Meech v. Wilder*, 130 Mich. 29, 89 N. W. 556; *Ruiz v. Dow*, 113 Cal. 490, 45 Pac. 867; *Kirkwood v. Smith*, 212 Ill. 395, 72 N. E. 427; *Wilson v. Carrico*, 140 Ind. 533, 40 N. E. 50, 49 Am. St. 213. From a careful examination of all the evidence, we conclude, that such a delivery was made by W. A. Maxwell; that it was his intention to place the deed beyond his dominion and control; that he did so by depositing it with the bank to be held until his death, and then delivered to the appellant Laura Harper; that he only retained the possession, use, and rental of the land during his lifetime, and that the appellant Laura Harper, upon such delivery to the bank, became immediately vested with the fee simple title, subject only to Maxwell's life estate.

The respondents, however, contend that the deed itself indicates that Maxwell did not intend it to pass from his dominion or control during his lifetime; that its language being clear and certain, no parol evidence showing the surrounding circumstances should have been admitted to add to, modify, or change its terms; that the evidence of Hardy E. Hamm, stating the conversation between himself and Maxwell, was inadmissible, such conversation being a privileged communication between himself as attorney and Maxwell as client; that McMasters and Jackson, the respective cashiers both understood the bank was holding the deed as agent for

Maxwell and subject to his control; that they would have returned it to him had he so requested; that Maxwell himself, by his subsequent acts in selling the bank stock and in leasing and mortgaging the land, evidenced the fact that it was not his intention to permit the possession of the deed, or the title to the land to pass from him, and that the deed was absolutely void for want of delivery.

The respondents' contention that the deed itself shows no intention to deliver during the lifetime of Maxwell is based upon the scrivener's use of the word "agent" in the clause above quoted. They insist that this word shows an intention on the part of the grantor to make the bank *his* agent, that it was not the agent of the grantee, that upon his death its agency ceased, and that as it had then made no delivery, none could be thereafter made. It is true that the word "agent" has a technical meaning, and that the relation of principal and agent is terminated by the death of the principal. It should be noted, however, that the grantor intended the deed to serve some lawful purpose, and did not understand himself to be performing an idle act in executing and depositing it with the bank. In construing the deed, elementary rules require us to adopt such an interpretation as will give it force, rather than one that will make it of no effect. *Pennsylvania Mtg. Inv. Co. v. Simms*, 16 Wash. 243, 47 Pac. 441.

In *Jackson v. Meyers*, 3 Johns. 388, 395, Chancellor Kent said:

"The intent, when apparent and not repugnant to any rule of law, will control technical terms, for the intent, and not the words, is the essence of every agreement. In the exposition of deeds, the construction must be upon the view and comparison of the whole instrument, and with an endeavor to give every part of it meaning and effect."

Applying this rule, we do not think we are compelled to so construe the use of the word "agent" as to hold that the bank was only the agent of the grantor and that it could not deliver the deed to Mrs. Harper after his death. The apparent

intent of Maxwell, as gathered from the entire instrument and the surrounding circumstances, should control the use of technical terms. The trial court evidently considered that the use of the word "agent" rendered the deed somewhat ambiguous, and therefore admitted evidence of all the circumstances surrounding its execution and deposit. To this evidence the respondents objected, and they now insist that it was incompetent and should not be considered. We think it was properly admitted to aid the court in arriving at a correct interpretation of the language used, and that it clearly shows the intention to make a present delivery such as would place the deed beyond the grantor's dominion and control.

The evidence of Hardy Hamm, to which the respondents objected, was properly admitted, as the conversation to which he testified tended to show an intentional delivery by Maxwell, and was not such a confidential communication between attorney and client as to be privileged and inadmissible. *Rosseau v. Bleau*, 131 N. Y. 177, 30 N. E. 52, 27 Am. St. 578. Assuming that the two cashiers, McMasters and Jackson, did in fact regard the deed as being in the custody of the bank subject to the dominion and control of W. A. Maxwell, and that they would have returned it to him had he so requested, such a mistaken view entertained by them as to their duty in the premises would not avoid the deed or its delivery. *White v. Watts*, 118 Iowa 549, 92 N. W. 660.

While it is true that Mr. Maxwell afterwards leased and mortgaged the land, we do not think he thereby deprived the appellant Laura Harper of her vested title. The vital question here is not what intention he may have afterwards formed, but what was his intention at the time the deed was executed and deposited with the bank. If his intention was such as to make the delivery complete and valid in the first instance, he had no right thereafter to change such intention and withdraw the deed or mortgage the land without the consent of his grantee. *Bury v. Young*, 98 Cal. 446, 33

Pac. 338, 35 Am. St. 186; *Kirkwood v. Smith*, 212 Ill. 395, 72 N. E. 427; *Albright v. Albright*, 70 Wis. 528, 36 N. W. 254; *Grilley v. Atkins*, *supra*.

The mortgagees will doubtless be protected in their lien, if they acquired it without notice of the existence of the unrecorded deed, or of the title of the appellant Laura Harper, but that fact cannot affect her right to retain her title to the land as against the legatees and executor of Maxwell.

Our conclusion from the evidence is that W. A. Maxwell intended to deliver the deed, that it is not void for want of delivery, and that the trial court erred in vacating and setting it aside. The judgment is reversed, and the cause remanded with instructions to enter a decree in favor of the appellant, quieting her title to the land as against the respondents.

RUDKIN, DUNBAR, and FULLERTON, JJ., concur.

HADLEY, C. J., MOUNT, and CHADWICK, JJ., took no part.

[No. 7461. Decided January 5, 1909.]

JESSIE F. SHEBLE, *Respondent*, v. OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*.[1]

CARRIERS—OF GOODS—CONNECTING CARRIERS—PRESUMPTIONS—DISTINCT SHIPMENTS. The presumption that goods shipped by connecting carriers were received by the last carrier in the same condition as when delivered for shipment to the initial carrier does not apply where there were two distinct transactions or shipments; and where a ticket was purchased over one road from St. Louis to Kansas City and a trunk checked to that point, without any indication that the journey would be continued, a railroad company checking the trunk upon a ticket subsequently purchased from Kansas City to Seattle is not liable for loss of contents of the trunk, which had been opened and rifled, where there was no evidence as to the condition of the trunk and contents at the time it was checked upon the last ticket.

Appeal from a judgment of the superior court for King county, Griffin, J., entered February 8, 1908, upon the

[1]Reported in 98 Pac. 745.

verdict of a jury rendered in favor of the plaintiff for loss of goods shipped, after a trial on the merits. Reversed.

W. W. Cotton, Arthur C. Spencer, and *John P. Hartman*, for appellant, contended, among other things, that in the absence of testimony showing the delivery of the trunk and contents in good condition to the defendant at Kansas City, the jury's finding that the trunk was in good condition and contained the articles enumerated by the plaintiff must of necessity be founded on mere speculation and conjecture. *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118. The line from St. Louis to Kansas City was not a connecting carrier, and the rule applied to connecting carriers cannot apply between it and the Union Pacific. *Felder v. Columbia etc. R. Co.*, 21 S. C. 35, 53 Am. Rep. 656; *Central Trust Co. v. Wabash etc. R. Co.*, 31 Fed. 247; *Moore v. Missouri etc. R. Co.*, 18 Tex. Civ. App. 561, 45 S. W. 609. The burden was upon plaintiff to show what particular baggage was delivered to defendant's agent, the Union Pacific Railroad Company, at Kansas City. *McQuesten v. Sanford*, 40 Me. 117; *Galveston etc. R. Co. v. Schafermeyer*, 31 Tex. Civ. App. 586, 72 S. W. 1037; *Marquette etc. R. Co. v. Kirkwood*, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453; *Marquette etc. R. Co. v. Langton*, 32 Mich. 250; *Felder v. Columbia etc. R. Co.*, and *Central Trust Co. v. Wabash etc. R. Co.*, *supra*. The contract of carriage limiting the amount of recovery in case of loss of baggage was valid, and the plaintiff was bound thereby. 3 Am. & Eng. Ency. Law (2d ed.), 560; *Rose v. Northern Pac. R. Co.*, 35 Mont. 70, 88 Pac. 767, 119 Am. St. 836; *Nevins v. Bay State Steamboat Co.*, 4 Bosworth (N. Y.) 225; *Jacobs v. Central R. Co.*, 208 Pa. St. 535, 57 Atl. 982; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. 432, 10 Am. Rep. 711; *Oil Creek & Allegheny R. Co. v. Clark*, 72 Pa. 231; *Lake Shore etc. R. Co. v. Rosenzweig*, 113 Pa. 519, 6 Atl. 545; *Railroad Co. v. Lockwood*, 17 Wall. 357, 21

L. Ed. 627; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Hill v. Northern Pac. R. Co.*, 33 Wash. 697, 74 Pac. 1054; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586. And the passenger is bound whether he actually reads the conditions or not. *Rose v. Northern Pac. R. Co.*, 35 Mont. 70, 88 Pac. 767, 119 Am. St. 836.

Herr, Bayley & Wilson, for respondent, contended that where baggage is delivered by the last carrier to the passenger in a broken or damaged condition, or a portion of it missing, the operation of the maxim *res ipsa loquitur* obtains, and it then devolves upon the carrier to produce evidence exonerating it, by showing that the trunk was received from the preceding carrier in the condition in which it was delivered. *Laughlin v. Chicago & N. W. R. Co.*, 28 Wis. 204, 9 Am. St. 493; Hammon, Evidence, page 293; Hutchinson, Carriers, § 761; *Shriver v. Sioux City & St. Paul R. Co.*, 24 Minn. 506; *Hammett & Katter v. Wabash R. Co.* (Mo. App.), 106 S. W. 1106; *Moore v. New York etc. R. Co.*, 173 Mass. 335, 53 N. E. 816, 73 Am. St. 298; *Memphis etc. R. Co. v. Holloway & Tatum*, 68 Tenn. 188; *Dixon v. Richmond etc. R. Co.*, 74 N. C. 538; *Leo v. St. Paul etc. R. Co.*, 30 Minn. 438, 15 N. W. 872; *Montgomery etc. R. Co. v. Culver*, 75 Ala. 587, 51 Am. Rep. 483; *Beard v. Illinois Cent. R. Co.*, 79 Iowa 518, 44 N. W. 800, 18 Am. St. 381, 7 L. R. A. 280; *Savannah etc. R. Co. v. Harris*, 26 Fla. 148, 7 South. 544, 23 Am. St. 551; *Faison v. Alabama etc. R. Co.*, 69 Miss. 569, 13 South. 37, 30 Am. St. 577; *Forrester v. Georgia R. & Banking Co.*, 92 Ga. 699, 19 S. E. 811; 3 Thompson, Negligence, § 3462; 6 Cyc. 664. A carrier may, by reasonable regulation, limit his liability, but notice of the regulation must be brought home to the passenger before commencement of the journey. *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *Hill v. North-*

ern Pac. R. Co., 33 Wash. 697, 74 Pac. 1054; *Muldoon v. Seattle City R. Co.*, 10 Wash. 311, 38 Pac. 995, 45 Am. St. 787.

DUNBAR, J.—On October 17, 1906, the respondent Jessie F. Sheble purchased a ticket at St. Louis, Missouri, over the Wabash railroad, for Kansas City, Missouri, and had her trunk, filled with clothing and personal effects, checked to Kansas City. On the following day she purchased a through ticket from Kansas City to Portland, Oregon, with exchange coupon for Seattle, Washington. The ticket from Kansas City entitled her to passage over the lines of the Union Pacific Railway Company, the Oregon Short Line Railroad Company, and the Oregon Railroad & Navigation Company. Upon arriving at Portland, she examined her trunk and ascertained that it had been broken open and rifled, and that a great deal of her clothing and personal effects had been removed. She reported the condition of the trunk to the agent, and endeavored to secure compensation for damages, but without success, and brought this action for damages. Judgment was rendered in her favor and appeal taken.

Many assignments of error are made, which involve questions of admission and rejection of testimony and of alleged error in giving and refusing instructions, but which, in consideration of our opinion in relation to error number three, viz., that the court erred in overruling the appellant's motion for a judgment of nonsuit, it is not necessary to discuss; for we think, without question, the motion for nonsuit should have been sustained. It is not necessary to review the authorities cited by appellant in this case, for we think that the authorities cited by the respondent are sufficient to sustain the appellant's contention that nonsuit should have been granted. The responsibility of connecting carriers is based upon a presumption. That presumption is that goods, having been received by the initial carrier in good order, have been transmitted and delivered in good order to every

succeeding carrier along the line. This presumption becomes necessary to protect the shippers' rights and to save them from the necessity of making proof, which under the circumstances would be almost, if not entirely, impossible for them to make, they having no jurisdiction or observation of the goods during the transit, while the care and custody and observation of the goods have been in the hands of the respective carriers. Any rule of law which would practically cripple or defeat the plaintiff's remedy in a case of this kind would be in conflict with the policy of the law generally, and would in effect deprive shippers of the right to recover for loss of goods. This was what was decided by the authorities cited by the respondent, notably Hammon on Evidence, p. 93, where the author says:

"In the case of connecting carriers, if goods received by the consignee in a damaged condition are shown to have been delivered in a good condition to the initial carrier, the presumption is that they were in that condition when they came into the hands of the last carrier, and he may accordingly be held liable, in the absence of evidence to disprove the presumption."

Hutchinson on Carriers, §1348 (§761) announces substantially the same rule when he says:

"But a connecting carrier, who has completed the transportation and delivered the goods to the consignee in a damaged condition or deficient in quantity, will be held liable in an action for the damage or deficiency, without proof that it was occasioned by his fault, unless he can show that he received them in the condition in which he has delivered them. The condition and quantity of the goods when they were delivered to the first of the connecting carriers, being shown, the presumption will arise that they continued in that condition down to the time of the delivery to the carrier completing the transportation and making the delivery to the consignee, and that the injury or loss occurred while they were in his possession."

The case of *Laughlin v. Chicago & N. W. R. Co.*, 28 Wis. 204, which is pronounced by the respondent the leading

case on this question and which she largely relies upon, was a case where the goods were delivered to the initial carrier and the railways over which the goods were shipped were admitted to constitute connecting and continuous lines from the place of shipment to the place of the delivery of the goods. Proof was made of the condition and quality of the goods when shipped and of the loss of a portion of the goods when they were received, and after a long discussion of the principles which should be applied to a case of that kind, the court announced the rule in practical conformity with the rules cited above from the other cases.

But this rule has no application to the case before us, for no proof was offered in relation to the condition of the goods at the time they were delivered to the initial carrier, viz., the road from which respondent purchased her ticket at Kansas City for Seattle. The purchase of the ticket and the checking of the goods from St. Louis to Kansas City was an absolutely distinct transaction from the purchase of the ticket from Kansas City to Seattle. It is true that the second ticket was purchased within a day or two after respondent's arrival at Kansas City from St. Louis, but the lapse of time could in no way connect the transactions. In fact, there is nothing to indicate that there was any intention on the part of the respondent to pursue her journey any further than Kansas City at the time she made the trip. She frankly testifies that she has no knowledge whatever of any condition of the trunk at the time that it was checked at Kansas City for Seattle. That being true, the presumption which we have been discussing above could not attach, because the presumption goes only to the maintaining of the quality of the goods at the time they were shipped, and there being no proof of the condition of the goods at that time, there could of course be no presumption that they were delivered to any of the connecting lines in a good condition. We think the testimony was not sufficient to sustain a judgment, and that the motion for nonsuit should have been sustained.

The judgment will be reversed, with instructions to the lower court to sustain the motion for a nonsuit.

RUDKIN, CROW, and MOUNT, JJ., concur.

HADLEY, C. J., and FULLERTON, J., took no part.

[No. 7540. Decided January 5, 1909.]

BANK OF MONTREAL, *Appellant*, v. FRANK GUSE, *Respondent*.[1]

LIMITATION OF ACTIONS — FRAUDS, STATUTE OF — NEW PROMISE. Under Bal. Code, § 4816, which provides that no acknowledgment or promise shall be sufficient to take a case out of the operation of the statute unless the same is in writing and signed by the party to be charged, correspondence relating to several promissory notes given at different times is not sufficient to remove the bar of the statute of limitations, where it consists of detached fragmentary statements of different dates susceptible of different interpretations, and there is no clear and unequivocal reference to any particular debt from which a promise can be implied to pay all or any one of the notes, but a controversy as to the amount due appears.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 21, 1907, dismissing an action upon promissory notes, upon sustaining a demurrer to the complaint. Affirmed.

Bausman & Kelleher, for appellant, contended that the correspondence between the appellant and the respondent was a sufficient acknowledgment of respondent's debt to take the same out of the operation of the statute of limitations. *Will v. Marker*, 122 Iowa 627, 98 N. W. 487; *Chidsey v. Powell*, 91 Mo. 622, 4 S. W. 446, 60 Am. Rep. 267; *Bliss v. Allard*, 49 Vt. 350; *McConaughy v. Wilsey*, 115 Iowa 589, 88 N. W. 1101; *Sears v. Howe* (Conn.), 68 Atl. 983; *Beeler v. Clarke*, 90 Md. 221, 44 Atl. 1038, 78 Am. St. 439; *Pracht v. McNee*,

[1]Reported in 98 Pac. 1127.

40 Kan. 1, 18 Pac. 925; *Vogelsang v. Taylor* (Tex. Civ. App.), 80 S. W. 637.

John B. Hart and *Robert H. Evans*, for respondent, contended that the acknowledgment or new promise contemplated by our statute must be expressed in a single writing. *Patterson v. Neuer*, 165 Pa. St. 66, 30 Atl. 748. Where the writing contains no promise, the acknowledgment of the particular debt must be so clear and unequivocal that no doubt is left as to the debtor's readiness and willingness to pay the same. *Sutton v. Burruss*, 9 Leigh (Va.) 381, 33 Am. Dec. 246; *Liberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998; *Wetzell v. Bussard*, 11 Wheat. 309, 6 L. Ed. 481; *Moore v. Bank of Columbia*, 6 Peters 86, 8 L. Ed. 329; *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. 1229, 30 L. Ed. 1156; *Palmer v. Gillespie*, 95 Pa. St. 340, 40 Am. Rep. 657; *Miller v. Baschore*, 83 Pa. St. 356, 24 Am. Rep. 187; *Ward v. Jack*, 172 Pa. St. 416, 33 Atl. 577, 51 Am. St. 744; *Gartrell v. Linn*, 79 Ga. 700, 4 S. E. 918; *Nelson v. Hanson*, 92 Iowa 356, 60 N. W. 655, 54 Am. St. 568; *Landis v. Roth*, 109 Pa. St. 621, 1 Atl. 49, 58 Am. Rep. 747; *Painters' Appeal* (Pa. St.), 6 Atl. 477. Where there are admittedly several debts, a general acknowledgment of the same is insufficient. 19 Am. & Eng. Ency. Law (2d ed.), 293; *Stout v. Marshall*, 75 Iowa 498, 39 N. W. 808, *Buckingham v. Smith*, 23 Conn. 453; *Smith v. Moulton*, 12 Minn. 352; *Opp v. Wack*, 52 Ark. 288, 12 S. W. 565, 5 L. R. A. 743; *Kensington Bank v. Patton*, 14 Pa. 479, 53 Am. Dec. 564; *Thompson v. Texas Land & Cattle Co.* (Tex. Civ. App.), 24 S. W. 856; *O'Riley v. Finegan*, 9 Kan. App. 889, 58 Pac. 281. The claim of offset rebuts the inference of a new promise. *Sutton v. Burroughs*, *Bell v. Morrison*, and *Wetzel v. Bussard, supra; Bullion & Exchange Bank v. Hegler*, 93 Fed. 890; *Wells v. Hargrave*, 117 Mo. 563, 23 S. W. 885; *Curtis v. Sacramento*, 70 Cal. 412, 11 Pac. 748. The acknowledgment, to be sufficient under the statute, must specify the amount which is due. *Monroe v.*

Herrington, 110 Mo. App. 509, 85 S. W. 1002; *Fort Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56, 28 L. Ed. 686; *Denny v. Marrett*, 29 Minn. 361, 13 N. W. 148; *Quarrier's Adm'r. v. Quarrier's Heirs*, 36 W. Va. 310, 15 S. E. 154.

DUNBAR, J.—The case is before the court on the plaintiff's amended complaint and the defendant's demurrer thereto. The complaint, in substance, is to the effect that the defendant, at Rossland, in the Province of British Columbia, Dominion of Canada, at different times ranging from January 23, 1899, to the 28th of March, 1900, executed notes to different parties, in the aggregate sum of $4,302, which notes were assigned for value to the plaintiff, the different notes being pleaded as separate causes of action. To this complaint a demurrer was interposed, the first ground of the demurrer being that it appears upon the face of said cause of action, and the allegations made and set forth therein, that said cause of action is barred by the statute of limitations. It is conceded that the statute of limitations ran before the commencement of the action, and that the demurrer was properly sustained unless the bar of the statute had been removed by an acknowledgment of or promise to pay the debt. The court sustained the demurrer, and the plaintiff appealed, relying upon the following correspondence between the parties to remove the bar:

"Rossland, B. C., February 27th, 1905.

"Frank Guse, Esq., Smith's Cove, North Seattle, Wash.

"Dear Sir: I must ask you to remit something on account of your debt to the bank and to authorize us to draw on you for some definite amount monthly, otherwise we will be compelled to adopt some other means of collecting what is due. Yours truly, J. S. C. Fraser, Manager."

"Seattle, Wash., Mar. 2nd, 1905.

"J. S. C. Fraser, Esq., Rossland, B. C.

"I am in receipt of your letter of the 27th ulto. and contents noted. I hope you will be able to make a disposition of the St. Pauls and Belcher in the spring so we could have a

settlement and I could use a little money myself. The property as you know is good and should sell for a fair price. Could you make me a cash offer for over and above of our differences on the St. Pauls and Belcher. I will send money for taxes tomorrow. Hoping to hear from you soon. Respectfully yours, Frank Guse."

"Seattle, Wash., Mar. 3rd, 1905.

"J. S. C. Fraser, Esq., Rossland, B. C.

"Enclosed find money order for $6.90 which is my portion of the taxes on St. Pauls and Belcher, including stamp. I have been informed that Ralston is working for F. August Heinze in Montana. Respectfully yours, Frank Guse."

"Rossland, B. C., March 7th, 1905.

"F. Guse, Esq., Smith's Cove, North Seattle, Wash.

"Dear Sir: I have yours of the 2nd and 3rd inst. Can you not remit Ralston's share and collect from him? He is not with Heinze as I have inquired. I doubt very much the sale of 'St. Paul' and 'Belcher' this spring or during the year, but the indications all point to a revival of interest in this camp later on. No, I cannot make you an offer for your interest in the properties. Enclosed is a statement of your indebtedness on which I will make a rebate if you can arrange to pay now or give ample security. Yours truly, J. S. C. Fraser, Manager."

"Rossland, B. C., 13th April, '05.

"Frank Guse, Smith's Cove, North Seattle, Wash.

"Dear Sir: I must again remind you of your debt to the bank and ask for a remittance on account of it. I would regret having to take action, but cannot allow the matter to drift further. If you will send us say $25 monthly, we will withhold legal proceedings so long as you keep up your payments. Please reply by return. Yours truly, J. S. C. Fraser, Manager."

"Seattle, Wash., April 22nd,1905.

"J. S. C. Fraser, Esq., Rossland, B. C.

"Dear Sir: I have looked over your statement carefully but have not discovered at any place where you have given me credit for the building which I bought at Columbia, B. C., and paid $650 for, with a rental income of $75 per month. This property I assigned to the Bank of Montreal, or J. S. C. Fraser, I forget which, also the Ralston note which was

reduced from $300 to $250 in the year 1898. I wish you would explain matters more thoroughly. Hoping to hear from you soon. Also I wish you would interest parties in bringing about the sale of the St. Pauls and Belcher. This certainly is as good a property as there is in the country for the amount of work done. Respectfully yours, Frank Guse."

"Rossland, B. C., 11th May, 1905.

"Frank Guse, Esq., Smith's Cove, North Seattle, Wash.

"Dear Sir: Referring to your letter of the 22nd ulto., I enclose statement of your account to the 15th inst., showing amount due to be $3,000 in full settlement, if payment be made at once, or security given that the bank will be satisfied with. The Columbia property was taken over by the owner of the land on which the buildings were, for non-payment of ground rent amount to $75, after which we collected $190 and applied it on your debt. Kindly sign and return the enclosed acknowledgment of the debt. Yours truly, J. S. C. Fraser, Manager."

"Seattle, Wash., May 16th, 1905.

"J. S. C. Fraser, Esq., Rossland, B. C.

"Dear Sir: I am in receipt of your letter of the 11th inst. You state in your letter that you have placed the $190 rent for the Columbia property to my credit, but I fail to find it on your statement. I wish you would look this up. I will again ask you to try and make a disposition of the St. Pauls and Belcher, or let some one have it on a bond, as I would like to have a little money out of it myself as I intend to go to Alaska in June or July. Hoping to hear from you soon. Respectfully yours, Frank Guse."

Our statute provides (Bal. Code, § 4816; P. C. § 300), that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby. It is contended by the respondent that there are several rules of law applicable to the question in this case, any of which considered alone would be sufficient to sustain the judgment of the superior court: (1) detached statements and fragmentary writings cannot be considered together in the utter-

ance of a new promise or acknowledgment; (2) where no promise to pay is made, the acknowledgment of the particular debt must be in terms so clear and unequivocal that a promise is raised as a natural inference from the language used; (3) where there are several debts, a general acknowledgment of the same is insufficient; (4) where the debtor claims offsets to the debt, this rebuts the inference of a promise to pay; (5) where the acknowledgment leaves the amount of the debt in dispute, it is insufficient.

These propositions, we think, are all well established by the great weight of authority. Many cases are cited by both the appellant and respondent, in which the correspondence relied upon is set forth, but it would be fruitless to review them here, for the reason that the expressions used in the various cases cited are different and might be differently construed by different courts. Every case, therefore, will have to be construed with reference to the language used in that particular case. Statutes of limitation are in aid of a sound public policy and have received the almost universal commendation of law-making bodies. Referring to the first rule invoked by the respondent, if detached statements and fragmentary writings of different dates, susceptible of different interpretations and which might be equally applicable to different transactions or debts, should be held to be sufficient to remove the bar of the statute, such holding would tend to destroy the object of the statute and make uncertain and speculative the very thing which the statute sought to make definite and certain, and mere inference would be substituted for direct and positive expression.

It cannot be contended in this case that there is any promise whatever to pay the alleged debt, or any part of it. Conceding that the statement in *Liberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998, which is criticized by the appellant, and which is to the effect that a mere acknowledgment of a debt is insufficient, was an extreme statement and not necessary to the decision of the case, it is well established that, where

acknowledgment alone is relied upon, the expression of the acknowledgment must be clear and unequivocal and made with reference to a particular debt which is subsisting at the time. The acknowledgment must be so clear that a promise to pay must necessarily be implied. It must be borne in mind that several causes of action are stated in the complaint in this case, the obligation arising from six different notes given at different times and to two different payees. In the light of this fact, even construing all of the detached statements together, it cannot be ascertained that any definite acknowledgment was made of indebtedness of all the notes or of any particular one of them. On the contrary, the whole correspondence shows that there was a controversy between the parties, and that controversy may have been in relation to these notes or it may have been in relation to some other transaction between the parties. There is no promise to pay in whole or in part. There is no definite acknowledgment of the indebtedness in whole or in part, and while it is true that no particular form of expression is necessary, to constitute an acknowledgment, the expression, whatever it is, must be clear and unequivocal. Such expressions are not shown by the correspondence here.

The judgment is affirmed.

HADLEY, C. J., CHADWICK, CROW, FULLERTON, RUDKIN, and MOUNT, JJ., concur.

[No. 7462. Decided January 5, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES POWELL, *Appellant*.[1]

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—ABUSE OF DISCRETION—CRIMINAL LAW. It is an abuse of discretion and error to deny a new trial, asked on the ground of newly discovered evidence, after conviction of statutory rape upon a female under the age of consent, where the conviction rested almost entirely upon the evidence of the prosecutrix, and she subsequently made affidavit, and testified in court on the hearing of the motion for new trial, that her testimony was false and that defendant had never had sexual intercourse with her, explaining that she was coerced to give false testimony (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered January 14, 1908, upon a trial and conviction of rape. Reversed.

E. T. Bascom and *E. C. Dailey*, for appellant.

G. D. Eveland and *Robert Mulvihill*, for respondent.

MOUNT, J.—The appellant was convicted of the crime of rape, alleged to have been committed upon a girl under the age of eighteen years. He appeals from a judgment of conviction based upon the verdict of a jury.

He assigns several errors, but we think there is no merit in any of the assignments except the one based upon the motion for new trial upon the ground of newly discovered evidence. The prosecuting witness was a girl just past fifteen years of age at the time of the alleged rape. She testified at the trial that she had voluntarily submitted to sexual intercourse with the appellant on April 21, 1907, and at different times thereafter; that on the night of April 21, she occupied a room with the appellant in a lodging house in the town of Monroe, in Snohomish county; that the appellant, after spend-

[1]Reported in 98 Pac. 741.

ing the night with her, left the room about ten o'clock the next day. She was corroborated in this latter statement by the proprietor of the lodging house, who testified that he saw the appellant come out of her room at about the time stated, and that he charged the appellant with having no business there, and appellant replied that he was there for the purpose of calling the girl to go to work for him, and when asked her name appellant replied that he had forgotten. There were other slight corroborating circumstances, but no direct evidence of the crime except the statements of the prosecuting witness. She admitted that she had made statements out of court to the effect that she had never had sexual intercourse with the appellant, and that stories to the effect that she had were false.

The jury, upon substantially this evidence, returned a verdict of guilty as charged. On the next day a motion for new trial was filed, upon the ground of newly discovered evidence, among others. Thereafter the prosecuting witness voluntarily wrote a letter to the appellant's counsel, stating in substance that the story she told at the trial was false. She afterwards made an affidavit in which she stated "under oath, that her testimony in said cause above mentioned wherein she testified that the defendant had had sexual intercourse with her was and is entirely false and without any foundation whatever, and that she never had sexual intercourse with said defendant at any time." About a week later she made another affidavit to the prosecuting attorney, stating that her statements in the first affidavit were false. Thereafter the motion for new trial came on for hearing, and the prosecuting witness was called to the stand and testified orally in explanation of these inconsistent affidavits. She then insisted that her first affidavit was correct, and that she had never had sexual intercourse with the appellant. She also explained her inconsistent positions by saying that she had testified as she did at the trial because she was threatened with sentence to the reform school unless she did so; that she made the first affidavit voluntarily, and

that she made the second affidavit controverting the first at the request of her mother and others. The court, after considering these affidavits and this evidence of the prosecuting witness, denied the motion for a new trial.

This ruling of the trial court is assigned as error, and we think the assignment must be sustained. Outside of the evidence of this girl, there is no evidence of the offense to submit to the jury. There is slight corroboration to the effect that the defendant was seen to come out of the room about ten o'clock one morning; but this fact, without the statement of the girl as to what he was there for, would not justify a conviction and penal sentence. It is the rule that questions of this character raised upon motions for new trial are largely discretionary with the trial court, and if these facts had been placed before the jury at the trial and the verdict of guilty had been returned, we would now say, as we did in *State v. Katon*, 47 Wash. 1, 91 Pac. 250:

"The witness, therefore, being a lawful one, it is not the province of this court to weigh her testimony. The jury do that in the first instance, and the trial court afterwards when the evidence is challenged, but when both the jury and the trial court say that the evidence is sufficient the question is ordinarily concluded."

The jury at the trial did not have the fact before it that the witness had made sworn statements contrary to her testimony. The witness made such sworn statements afterwards. It is true she testified that she had stated when not under oath that she had never had sexual intercourse with the appellant, but it is not uncommon for persons to deny such things when not under oath and afterwards, when they are on oath, admit the fact. Such witnesses may be worthy of belief, but it is rare that any person will testify to a truth and subsequently testify that such testimony was false. The evidence of such witnesses, uncorroborated in essential facts, ought to be received with caution, to say the least, and a man ought not to be sent to the penitentiary until a jury has had an oppor-

tunity to pass upon it, which has not been done here. No injustice can be done upon a new trial. New trials have frequently been granted upon the showing made in this case. *Bussey v. State*, 69 Ark. 545, 64 S. W. 268: *Mann v. State*, 44 Tex. 644; *Bates v. State* (Miss.), 32 South. 915; *Dennis v. State*, 103 Ind. 142, 2 N. E. 349; *State v. Moberly*, 121 Mo. 604, 26 S. W. 364.

Considering all the facts, we are of the opinion that the trial court abused its discretion in refusing to grant a new trial. The judgment is therefore reversed, and the cause remanded with direction to the lower court to grant a new trial.

HADLEY, C. J., DUNBAR, and CROW, JJ., concur.

FULLERTON, J. (dissenting)—The trial judge who saw the prosecuting witness was in a much better position than is this court to get at which of the times the prosecuting witness testified to the truth; and as he did not believe her subsequent confession, this court ought not to interfere with the verdict. I therefore dissent.

[No. 7494. Decided January 5, 1909.]

W. MARTELL *et al.*, *Appellants*, v. ST. FRANCIS HOTEL COMPANY, *Respondent*.[1]

TRADE NAMES—INJUNCTIONS—ENJOINING USE OF NAME FOR HOTEL. The keepers of a small hotel used principally as a rooming house by the week, called the Hotel St. Francis, are entitled to an injunction preventing the use of the same name for a large hotel catering principally to transients by the day, where it appears that the two hotels are in the same locality, both competing for transient trade, and that confusion results from the use of the same name; and it is immaterial that the defendant when it adopted the name had no knowledge of the prior use thereof by the plaintiffs and had no intent to deceive or defraud, or that it is more inconvenienced by the confusion than the plaintiffs, or the public.

[1]Reported in 98 Pac. 1116.

SAME—DEFENSES. In such a case, it is no defense that the plaintiff purchased their hotel and its good will pending the litigation, when all prior damages were waived.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 14, 1908, upon findings in favor of the defendant, after a trial before the court without a jury, dismissing an action for an injunction. Reversed.

Buck & Boddy, for appellants.

G. E. Steiner, for respondent.

MOUNT, J.—This action was brought to restrain the respondent from using the name "St. Francis" for his hotel, and for damages. The cause was tried to the court without a jury. Before the trial it appeared that the appellants had purchased the interest of the original plaintiffs, and the appellants were therefore substituted as plaintiffs. At the trial the substituted plaintiffs waived all damages prior to their purchase. Thereafter the evidence was all submitted, the court made findings of fact, and dismissed the action. The plaintiffs appeal.

The facts as found by the trial court are as follows:

"(1) That on or about the 20th day of May, 1907, the plaintiffs herein purchased from F. A. Lane the lease, furniture, furnishings and good will complete of the Hotel St. Francis, situated at No. 816, Union street, Seattle, and ever since have been and now are conducting said Hotel St. Francis; that said F. A. Lane purchased said Hotel St. Francis complete from his predecessors on or about the 11th day of July, 1906, and continued to run said hotel from the time he purchased the same until he sold it to the plaintiffs herein; that the predecessors of F. A. Lane established said Hotel St. Francis on or about one year prior to its purchase by said Lane; that said Hotel St. Francis is a wooden structure of forty-eight rooms having in connection therewith a dining room; that the patronage of the plaintiffs' hotel is principally such as secure accommodations by the week, or month, or for

longer periods, and is such a hostelry as is commonly known as a rooming house or boarding house and does not make a specialty of transient trade; that the lowest price charged for rooms at plaintiffs' hotel is $3.50 per week.

"(2) That the defendant is a corporation organized and existing under and by virtue of the laws of the state of Washington.

"(3) That on or about the 1st day of January, 1907, one H. E. Kennedy and a partner, one Stuart Johnson, established a hotel on the corner of Ninth avenue and Madison St. in the city of Seattle and selected for the name of said hotel the name St. Francis; that about the same time said Kennedy and Johnson filed articles of incorporation of the St. Francis Hotel Co., which incorporation was formed for the purpose of taking over said hotel.

"(4) That on or about the first day of February, 1907, one W. F. Kennedy purchased the interest of said Johnson in said hotel property and said corporation; that said H. E. Kennedy and said W. F. Kennedy thereafter subscribed for the entire capital stock of the St. Francis Hotel Company, and conveyed to said corporation the said St. Francis hotel.

"(5) That the defendant corporation has ever since been conducting said hotel under the name St. Francis; that at the time of forming said corporation and establishing said hotel and for two or three months after said hotel was in operation, neither said W. F. Kennedy nor his partner nor any one connected with said hotel or corporation had ever heard of the plaintiffs' hotel St. Francis, or of any other hotel of the same name in the city of Seattle; that the defendant's hotel is located in a building of brick and cement construction of one hundred and seventy-eight rooms having commodious dining room attachment, private baths, telephone exchange, billiard room and barber shop, and is in every respect equipped and operated as a modern transient hotel in the equipment of which defendants have expended $45,000; that the prices charged for accommodations at the defendant's hotel are from $2.50 to $4.50 per day; that in forming said corporation and establishing said hotel the defendant corporation and the individuals forming said corporation were guilty of no fraud whatever toward the plaintiffs, never having heard of plaintiffs' hotel, nor did they, nor have they at any time or in any manner attempted to attract to themselves the plain-

tiffs' patronage or good name, or to advertise their hotel as the plaintiffs' hotel, or to mislead the public into the belief that their hotel was the plaintiffs' hotel.

"(6) That soon after the establishment of the defendant's hotel the plaintiffs' predecessors began to receive many telephone calls intended for the defendant's hotel; that the plaintiffs continued to be and are yet the recipients of many telephone calls daily intended for the defendant's hotel; that during said Lane's ownership of the plaintiffs' hotel a consignment of groceries intended for the defendant's hotel were delivered to the plaintiffs' hotel and afterwards forwarded to defendant's hotel; that two or three times per week trunks intended for the defendant's hotel were delivered to the plaintiffs' hotel; that upon one occasion a call for a doctor for a guest at plaintiffs' hotel became confused and the doctor was delayed about two hours in answering said call; that in order for the plaintiffs to secure prompt delivery of supplies, baggage, etc., at the hotel, or to secure prompt response to calls to the hotel and to prevent confusion, it is necessary for the plaintiffs to add to the name of the hotel in orders for supplies, calls, etc., the street number of plaintiffs' hotel; that by adding such street number to orders, calls, etc., all confusion was avoided; that plaintiffs had knowledge of the said confusion and inconvenience and of the pendency of this action at the time they purchased said hotel."

The trial court seems to have been impressed with the fact that, at the time respondent named its hotel "St. Francis," it was not aware of the existence of appellants' hotel St. Francis; and with the fact that the hotels were of different grades, in that the Hotel St. Francis operated by appellants was more of a family hotel and conducted on a small scale and did not make a specialty of transient trade, while the St. Francis hotel operated by respondent catered more to transients and was a larger hotel and conducted on a more elaborate plan; and also with the fact that these appellants purchased knowing of the litigation which it assumed to carry on. The court, however, found that the hotel St. Francis was established about July, 1905, and that the St. Francis hotel was established about January 1, 1907; and it is con-

ceded that the latter hotel is located about four blocks from the former, in the city of Seattle. The court also found that, after the establishment of respondent's hotel under the name St. Francis, appellants daily received many telephone calls intended for the other hotel; that groceries for one were delivered to the other; that trunks and baggage intended for the guests of one were sent to the other hotel, and upon one occasion a call for a doctor at appellants' hotel became confused and the doctor was delayed thereby. These facts of course show confusion and injury, both to appellants' hotel and to the guests and the public with whom the hotel transacts business.

The question in the case is, shall the respondent under the facts as found by the court be enjoined from using the name St. Francis to designate its hotel. The rule seems to be well established, that "a corporation may be enjoined from using a name or conducting its business under a name so similar to the name of a previously established corporation, association, partnership, or individual, engaged in the same line of business, that confusion or injury results therefrom." Note to *International Silver Co. v. Rogers Corp.*, 66 N. J. Eq. 119, 57 Atl. 1037, reported in 2 Am. & Eng. Ann. Cases, p. 407. That case reviews many authorities upon the questions presented in this case, and many cases are there cited, both in the opinion of that case and in the notes, supporting the rule as above stated.

Respondent seems to rely mainly, as the trial court did, upon the facts that there is a difference in the character of the two hotels, and that there was no fraud or deception practiced or intended by respondent, because at the time the name was chosen it did not know of the appellants' hotel or its name. Respondent also argues that the confusion shown is to the appellants and not to the public, and that confusion to the appellants is not sufficient to warrant a restraining of the use of the name. There is a difference in the character of the two hotels in this, that one is larger than the other, and

is run on a more expensive plan, and caters to transient trade and charges higher prices; while the other is more of a family hotel, smaller, and charges lesser rates. But both take transient guests and are engaged in the same general business in the same locality. They are both hotels, and necessarily in competition with each other. The right to adopt a name already in use does not depend upon the capital invested or upon the kind of business done. If the right to adopt a name already used by a hotel depends upon the size of the building, or the rates charged, or the number of servants employed or the capital invested, then, as remarked by the appellants in their brief, this rule "would permit another company with more money than the defendant to establish a larger, better, and more exclusive hotel across the street from the defendant's hotel under the same name, and its business could be thus injured or even ruined without redress." Of course, that is not the rule. The general rule is, as before quoted, that one person may not use the name of another already in the same line of business so that confusion or injury results therefrom. There is no doubt that these two hotels are in the same line of business, and that injury and confusion results to the hotels and to the public.

It is also argued that the facts do not show any fraud or deception. Actual fraud or deception is not necessary in cases like this. 28 Am. & Eng. Ency. Law (2d ed.), p. 429. In *International Silver Co. v. Rogers*, *supra*, the court in discussing this point uses this language, at page 131:

"That this rule is not confined to copies or imitations of trade marks, appears from the following cases: *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; *Wyckoff, Seamans & Benedict v. Howe Scale Co.*, 110 Fed. Rep. 520: *Hendriks v. Montagu*, 17 Ch. D. 638; *North Cheshire etc. Brewery Co. v. Manchester Brewery Co.*, L. R. App. Cas. 83 (1899). In the last case, which is particularly pertinent because it involved the taking of a corporate name, Lord Halsbury thus expressed himself: 'In the result it is perfectly immaterial, to my mind, for the purpose of the decision, whether

they (the company) were fraudulent or not. The question is whether this (that is, the assumption of the name Cheshire and Manchester's Brewery Co.) is an injury to the plaintiff's right. If it is an injury to the plaintiff's right, it is perfectly immaterial whether they intended it or not. The court must restrain them from doing that which is an injury to another person, however inadvertently they may have done it.' "

To the same effect is *Howard v. Henriques*, 3 Sandf. (N. Y. Sup'r Ct.) 725, which is a case of an inferior court, but very much like this case. See, also, *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *Van Houten v. Hooten Cocoa & Chocolate Co.*, 130 Fed. 600. And the fact that the appellants bought the hotel St. Francis and its good will pending this case and knew of the litigation can make no difference in the case. Prior damages were waived. Appellants certainly are entitled to what they bought, and are as much entitled to the good name of the hotel as to the lease and the furniture thereof. We are satisfied from the evidence and from the findings of the court that the appellants are entitled to the injunctive relief demanded, and that the court erred in refusing to enjoin the respondent from using the name St. Francis for its hotel.

The judgment of dismissal is therefore reversed, and the lower court is ordered to enter a decree in accordance with this opinion.

HADLEY, C. J., DUNBAR, FULLERTON, RUDKIN, and CROW, JJ., concur.

[No. 7599. Decided January 5, 1909.]

E. MESHISHNEK, *Respondent*, v. SEATTLE SAND & GRAVEL COMPANY, *Appellant*.[1]

MASTER AND SERVANT—PLEADING—ISSUES AND PROOF—ASSUMPTION OF RISKS—KNOWLEDGE OF DEFECT—PROMISE TO REPAIR. An action for personal injuries sustained by reason of a defective gasoline engine, which the master had promised to repair, does not fail upon withdrawal of issues relating to the promise, where it is alleged and shown that defendant did not know of the danger, although he did know of the defect, and that the defect was the proximate cause of the injury, and the defect was not so serious that the engine could not be used with care.

SAME—DEFECTIVE MACHINERY—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action for injuries sustained by an operator of a gasoline engine, the plaintiff's assumption of risks and contributory negligence are for the jury, where it appears that plaintiff was employed to operate a steam engine, but at defendant's request undertook to operate a gasoline engine with which he had no experience and which was defective, that he operated it five or six weeks, starting it in the way he was instructed to do, whereby a spark set fire to oil that had been spilled by another employee without plaintiff's knowledge, causing an explosion of gasoline near an exhaust pipe, the plaintiff testifying that he knew of the defects in the engine but did not know of the danger.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 27, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by the operator of a gasoline engine. Affirmed.

Hayden & Langhorne and *A. R. Warren*, for appellant.

W. G. Heinly and *E. D. Hodge*, for respondent.

MOUNT, J.—Action for personal injuries. This cause was tried to a jury, and resulted in a verdict in favor of the plaintiff in the sum of $2,915. The defendant appeals.

[1]Reported in 99 Pac. 9.

The facts are substantially as follows: The respondent was employed by the appellant to operate a steam engine used by appellant. Some five or six weeks prior to the injury, respondent was requested to operate a gasoline engine in use by appellant. Respondent knew nothing about gasoline engines, or how to start or run them. Appellant's foreman told him and showed him how the engine was started and operated. Thereafter the respondent operated this gasoline engine, in the way he was instructed, to the time of his injury. The engine was out of repair in several particulars, one of which was that the aperture in the prime plug was filled up so that the plug had to be removed before the engine could be primed, when it was desired to start it.

On the day before the accident, appellant's foreman attempted to repair the engine, but without success. In some way at that time oil was spilled over the engine and upon the ground, and respondent went to work that evening and attempted to start the engine in the way he had been instructed to do, viz., by removing the prime plug, squirting oil into the cylinder head, and bringing the electric wires in contact across the hole in the cylinder head from which the prime plug had been removed. When he did this, the spark thus secured set fire to the gasoline which was on the face of the engine, which fire was communicated along the ground to a can of gasoline kept under the exhaust pipe, which can of gasoline was thereby exploded and caused the injuries complained of. Respondent did not know about the oil which was spilled as above stated. The complaint alleged that the machinery and appliances furnished by appellant to respondent were defective and out of repair. The defects were described, and then it was alleged further:

"That the plaintiff, believing that the danger attached to the running of said engine was not so imminent and immediate but what he could reasonably operate the same for a reasonable length of time without danger to himself, and knowing the engine was being run during the day under like con-

ditions by ordinarily prudent men, and under the promise of the foreman of said defendant, given to the plaintiff within two days prior to said accident, that the same would be repaired, and with the expectation that it would be repaired within a short time, the plaintiff went to work, and at the time of the accident before mentioned said engine had not been so repaired. That the plaintiff's injuries hereinbefore alleged were occasioned by the negligence of the defendant, without any negligence whatever on the part of the plaintiff, and by reason of the failure of the defendant to furnish safe, suitable, and proper machinery and appliances for the work which plaintiff was directed and ordered by the defendant to do, and by reason of the defendant's failure to remedy the defects in said machinery as aforesaid."

At the close of the respondent's evidence, the court, upon motion of appellant, withdrew from the consideration of the jury all questions of negligence based upon the alleged promise to repair, but denied appellant's motion for a nonsuit upon the ground of assumed risk and contributory negligence. At the close of all the evidence in the case, appellant renewed its motion for nonsuit and directed verdict. This motion was denied. The rulings of the trial court upon these motions constitute the only errors assigned upon this appeal.

The appellant bases his argument for reversal upon the fact that the complaint is predicated upon a promise to repair, and that the respondent must be held as a matter of law to have assumed the risk where he knew the defects and where there was no promise to repair. The complaint alleged as one cause of negligence defective machinery and a promise to repair; but it also alleged negligence by reason of failure to furnish "safe, suitable, and proper machinery and appliances." It is, no doubt, the law that, if the respondent knew of the danger from the machine, or if the danger was so open and apparent that he should have appreciated it, he assumed the risk. The respondent testified that he knew of the defects, but he denied knowledge of the danger. In the case of *Pearson v. Federal Min. etc. Co.*, 42 Wash. 90, 84 Pac. 632, we said:

"The general rule is that, if the servant knows the danger, or if it is so patent that an ordinarily prudent person would see and appreciate it, and he continues in the master's service, he assumes the obvious risk; but if the defects in the machinery or appliances grow out of the want of ordinary care on the part of the master and are not so serious but the appliances may be safely used with care and prudence, the master is liable where an injury occurs when the injured servant uses the appliances with care."

To the same effect, see, also, *Bailey v. Mukilteo Lumber Co.*, 44 Wash. 581, 87 Pac. 819; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1091; *Shoemaker v. Bryant Lumber & Shingle Mfg. Co.*, 27 Wash. 637, 68 Pac. 380.

The record shows, that the respondent was not experienced with this kind of a machine; that at the time he was requested to operate it he knew nothing about it, and was instructed how to start and run it by his foreman; that he afterwards started it, upon the occasion of his injury, as he had been instructed. He had operated the machine for five or six weeks and no accident of any kind had occurred before. The evidence does not show that the respondent spilled the oil upon the machine or upon the ground, or that he knew the oil was spilled, or that there was oil near which was liable to become ignited by the electric spark. There is some evidence to the effect that the foreman in attempting to repair or adjust the machine during the day had spilled the oil, and that the respondent did not know and was not informed of that fact until after the explosion. Labatt, in his work on Master & Servant, Vol. 1, page 1045, says:

"In many instances where the injured servant had had no experience, or virtually none, in dealing with conditions similar to those which he was required to encounter, it is deemed unwarrantable to take the case from the jury or override a verdict in his favor, although it may be certain that the risk to which the injury was traceable was one which he would have been conclusively presumed to appreciate, if he had been

engaged for a longer time in discharging similar duties under similar circumstances, either for defendant or for some other employer."

Under the facts as they appear in this case, we think it cannot be said, as a matter of law, that the respondent knew or should have known of the danger of starting the machine as he did. The question of assumed risk was therefore for the jury. We are also of the opinion that the question of contributory negligence was for the jury, and that the defective condition of the machinery was the proximate cause of the injury. We think it is not necessary to discuss these points further.

There is no error in the record, and the judgment must therefore be affirmed.

DUNBAR, FULLERTON, and RUDKIN, JJ., concur.

HADLEY, C. J., and CROW, J., took no part.

[No. 7409. Decided January 6, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Johanna M. Shropshire, Appellant*, v. THE SUPERIOR COURT FOR PACIFIC COUNTY *et al., Respondents.*[1]

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. An objection that a corporation, composed of two stockholders who are husband and wife, is not entitled to exercise corporate functions or the right of eminent domain, cannot be raised on appeal where no exceptions were taken to findings to the effect that the corporation was duly organized and existing.

EMINENT DOMAIN — PARTIES ENTITLED — WATER COMPANIES — STATUTES—CONSTRUCTION. A water company having a municipal franchise to supply water to a city and its inhabitants, is, under our constitutional and statutory provisions, authorized to exercise the right of eminent domain to acquire the necessary lands and waters, where the owner thereof refuses to supply the city with water upon

[1]Reported in 99 Pac. 3.

request so to do; and the general statutes subjecting such corporations to control and regulation are sufficient in that respect without any statute fixing the rates which shall be charged for such supply.

SAME—PRIVATE USES. The supplying of water by a water company to mills and factories for the purpose of generating power is a private use.

SAME. The fact that one of the declared purposes of a water company was to furnish water to mills and factories for the private purposes of generating power, does not preclude it from condemning the waters of a stream, where there is evidence of the necessity thereof to supply water to the city for municipal purposes and its inhabitants for ordinary domestic uses.

Certiorari to review a judgment of the superior court for Pacific county, Rice, J., entered April 23, 1908, adjudging a public use in condemnation proceedings, after a trial before the court. Affirmed.

Chas. E. Miller, for relator.

Welsh, Welsh & O'Phelan, for respondents.

HADLEY, C. J.—This action was instituted as a condemnation proceeding, and the trial court found that the property is sought for a public use. A writ of review was issued by this court at the instance of the property holder, and the order of the court adjudging the use to be a public one and calling for a jury to determine the damages is now here for review.

The petition for condemnation was filed by the Raymond Light & Water Company, alleged to be a corporation organized and existing under the laws of the state of Washington. The purposes for which the corporation is organized are extensively enumerated, but in the main they are to supply the cities and towns of Washington, and the inhabitants thereof, with pure, fresh water, for domestic, municipal, and industrial purposes, including the sale of water to private persons or corporations for industrial purposes. It is averred that the city of Raymond is a municipal corporation, and

that, prior to the institution of the condemnation proceeding, that city granted to the petitioner a franchise authorizing it to build and maintain a water plant and water works, within the city, for the purpose of conveying water to supply the city and the inhabitants thereof with pure and fresh water for domestic use, municipal purposes, fire protection, and industrial and other lawful purposes; that the franchise was accepted by the petitioner and is now in full force; that the city of Raymond has a population of about two thousand people, and that the number of inhabitants is increasing and will continue to increase; that the city has no water plant or system of its own for supplying water, and the inhabitants depend entirely upon petitioner to supply them with water; that the claimant is the owner of certain described real estate over and through which flows Butte Creek, a nonnavigable stream of pure, fresh water, in the waters of which stream the claimant, as owner of the land, has certain rights; that pursuant to the franchise granted to the petitioner by the city, the former has erected a water plant and is now engaged in supplying the city and its inhabitants with water, but not in sufficient quantities; that in order to supply an adequate amount of water, it is necessary to take and use all the waters of Butte Creek, and to take them at a point on the creek above the claimant's land, thereby diverting all of the waters; that the petitioner has obtained from all persons owning land upon and over which the stream flows the right to take and use the waters thereof, for the purposes aforesaid, except from the claimant, and she has refused to permit the petitioner to take or use any of the waters; that after the petitioner had secured its franchise from the city, the latter through its council, endeavored to have the claimant supply the city with water, but she refused to supply any water for any purpose, and thereafter the city council notified the petitioner, and in regular session authorized the latter, to pro-

ceed to acquire the waters in the manner provided by the laws of the state of Washington; that, prior to beginning this condemnation proceeding, the petitioner endeavored to secure from the claimant the right to take and use the waters, but it has been unable to agree with her as to the amount of compensation to be paid; that it is essential for the health and existence of the city and its inhabitants that the petitioner shall take and use all of the waters of said stream for the purposes aforesaid, and for that purpose condemnation is sought. At the trial upon the question of public use, the court found the facts substantially as set forth in the petition, and as stated above.

The first proposition argued by the relator, to whom we shall refer as "the claimant," is her assertion in the brief that the respondent company is composed of but two stockholders who are husband and wife, and that being husband and wife constituting a community, they are not sufficient in number to authorize the exercise of corporate functions. The conclusion from the argument, as drawn by the claimant, is that the right of eminent domain cannot be exercised by the respondent. We think, so far as the claimant is concerned, that she is precluded from raising a question of this character at this time, by reason of findings of the court to which she did not except. The court found as follows:

"That the petitioner is now, and was at all of the times in petitioner's petition mentioned, a corporation duly organized and existing under and by virtue of the laws of the state of Washington . . . that petitioner, prior to the commencement of this action, paid all of its annual license fees to the state of Washington so as to entitle it to commence and maintain this proceeding."

The above must be accepted as facts established by the record, and when it is the fact that the corporation is one "duly" organized and "existing," and that it has put itself

in position "to entitle it to commence and maintain this proceeding," there seems to be no ground left for claimant's argument, and her contention in this regard must be denied.

It is next argued that the power of eminent domain should be denied, for the alleged reason that there is no method provided by statute, ordinance, or otherwise for supervising or controlling the acts of the respondent corporation. We think sufficient provision for such a supervision has been made. The state constitution provides as follows:

"All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law." Const., art. 12, §1.

It is also provided by statute that corporations may be organized for the purpose of supplying cities and towns and their inhabitants with water, and that such associations shall be subject to the same rules of regulation and restriction as apply to all other corporations.

"The provisions of this chapter shall extend to and apply to all associations already formed under any law of this state or hereafter to be formed under the provisions of this act, for the purpose of supplying any cities or towns in this state, or the inhabitants thereof, with pure and fresh water." Bal. Code, § 4277 (P. C. § 7080).

It is also provided by statute that such water companies may acquire by purchase or appropriation the necessary lands and waters for their purposes, as follows:

"Such water companies, incorporated for the purposes specified in the preceding section, shall have the right to purchase or take possession of and use and hold such lands and waters for the purposes of the company, lying without the limits of the city or town intended to be supplied with water, upon making compensation therefor. The mode of proceeding to obtain possession of such lands for the use of the

company, right-of-way for laying pipes and aqueducts for the use of the company, when the parties cannot agree, shall, so far as the same be applicable, be as prescribed in article 4 of chapter 3: Provided, That nothing therein contained shall be so construed as to authorize the appropriation of water belonging to any person, unless the owner thereof shall refuse to supply said town or city with water, after being requested so to do by the town board or city council." Bal. Code, § 4278 (P. C. § 7081).

It will be remembered, from our statement of the facts substantially as found by the court, that the latter provision of the above quoted section was fully met. The claimant refused to supply the city with water, after being requested so to do by the city council. It is also further provided by statute that such water companies must first obtain from the city the right or privilege to furnish the water.

"Water companies hereafter incorporating, under the provisions of this chapter, must first obtain from the corporate authorities of a city or town intended to be supplied with water the right or privilege so to do; but nothing herein contained shall affect parties now acting under legislative grants or franchises." Bal. Code, § 4279 (P. C. § 7082).

We have seen that the privilege required by the above section was granted by the city of Raymond to the respondent. It therefore appears that the respondent has fully complied with statutory regulations. By these regulations the state has delegated to respondent the right to furnish the city of Raymond and its inhabitants with water, and to effect that purpose has authorized it to appropriate land or water lying even without the limits of the city. The statute governing all corporations in general, as well as those relating to such water companies in particular, furnish much opportunity for supervision and control over the corporate acts, and the claimant's argument that such control is lacking is fully met by the existence of these statutes. Furthermore, the ordinance

of the city of Raymond which grants to respondent the right to furnish water contains many regulative and restraining provisions which the city may exercise in connection with the service of the respondent. The provisions made by our legislature authorizing such water companies to furnish water to cities and their inhabitants, and to appropriate land and water therefor, are usual provisions and are very generally supported by authority.

"The supplying of pure water by a private corporation to the inhabitants of a city, town, village, or other community is a measure of public utility for which private property may be taken under the right of eminent domain, and for which the right of an individual to enjoy the flow of water in its natural channel upon his land may be condemned." 15 Cyc. 593.

The same principle is stated again as follows:

"The supplying of water to a city and its inhabitants is undoubtedly a public purpose, to accomplish which the legislature may confer upon a city, or a company organized to carry out that purpose, the right to condemn private property upon payment of just compensation." 30 Am. & Eng. Ency. Law (2d ed.), p. 408, and cases there cited.

This court has heretofore recognized the authority of the state as delegated to such water companies. *Everett Water Co. v. Powers*, 37 Wash. 143, 79 Pac. 617. While it is true that no statute now exists fixing the rates which water companies may charge, yet the power to regulate and control is vested in the legislature by the constitutional provision heretofore quoted. The water company is a delegated agency of the state, and as such it may be fully controlled by the state. As an agency for the service of the public, it may exercise the right of eminent domain for the accomplishment of a public purpose, the property which it so acquires being *ipso facto* devoted to a public use.

"In accepting a franchise, a water company acts, not as a private, but as a *quasi*-public corporation. It enjoys and must exercise its opportunities for gain subject to its obligation to

the public, that it will supply water, without unjust discrimination and at uniform rates, to all those along the lines of its mains, who apply and tender a reasonable compensation." 30 Am. & Eng. Ency. Law (2d. ed.), 426, and authorities there cited.

It is next argued by the claimant that condemnation should be denied to the respondent, for the reason that some of the declared objects of respondent's organization as hereinbefore stated are purely private in their nature, and call for furnishing water to private persons and corporations for private purposes only. The principal argument upon this point is to the effect that the respondent proposes to furnish water to private persons and corporations to be used in boilers to generate steam for sawmills and shingle mills for the manufacture of lumber and shingles. It is contended by the claimant that such a use of the water would be private within the following decisions of this court: *Healy Lumber Co. v. Morris*, 33 Wash. 490, 47 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820; *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842. In this view of claimant's counsel we concur. The respondent argues that such a use is domestic, and that it comes within the ordinary classification of furnishing water to "the inhabitants" of the city. It is urged that, when water is furnished to a mill proprietor, it is furnished to an inhabitant for his use just as in the case of furnishing to a home, and that the use is domestic and public in one case as much as in the other. Respondent says that water supplied in the manner indicated is not delivered for the use of motors or directly for power purposes. We are unable to make such a distinction. If the water is delivered for the avowed and understood purpose of supplying boilers in order to generate steam for the power purposes of private manufacturing concerns, we think such delivery is for a private purpose.

However, the argument of counsel upon this subject presents more of a moot question than otherwise in this case. The

fact that respondent makes the above contention does not defeat its right to condemn in this action, inasmuch as the evidence clearly shows the necessity for this water to supply the city of Raymond for sewerage purposes, fire protection, and other municipal uses, and also to supply its inhabitants for ordinary domestic uses in their homes and otherwise, as such use is commonly understood. The judgment of the court on the question of public use is sustainable for the above reasons, and the respondent may condemn in order to serve its public service functions, but not to aid it in the prosecution of any service which is purely private in its nature. If, after the appropriation of the claimant's property is effected and the compensation for the public use is paid, the respondent should undertake to make a private and improper use of the property so appropriated, the remedy in such cases can then be sought. What we have said upon the subject of what may constitute a private use of the property was because of the extended discussion thereof in the briefs. To prevent any possible future effort to give the court's judgment in its application such scope as the respondent suggests for it, we have thought it best to make the observations we have. No modification of the judgment is directed, however, and the claimant is therefore not entitled to recover costs.

The judgment as to necessity for appropriation is affirmed, and the cause is remanded with instructions to the trial court to proceed to ascertain the amount of compensation to be paid, in the manner provided by law.

FULLERTON, CROW, and MOUNT, JJ., concur.

RUDKIN and CHADWICK, JJ., took no part.

[No. 7573. Decided January 6, 1909.]

OTTO BEILKE, *Appellant*, v. JOHN CARROLL *et al.*, *Respondents*.[1]

MASTER AND SERVANT—INJURIES TO THIRD PERSON BY SERVANT—SCOPE OF EMPLOYMENT—INTOXICATING LIQUORS—DUTY TO KEEP ORDERLY PLACE. Where the owners of a saloon left the same in control of a bartender, they are liable in damages for the act of the bartender in setting fire to alcohol which he had poured into the shoe of a customer who had fallen asleep; since during the absence of the owners the bartender represented them in their duty to keep an orderly place.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered July 2, 1908, in favor of the defendant by direction of the court, after a trial before a jury, in an action for personal injuries sustained through the wrongful act of defendant's servant. Reversed.

Chas. E. Miller, for appellant, contended that a person licensed to sell intoxicating liquors is bound to keep an orderly house, and he is liable in damages for the acts of disorderly persons upon his premises, causing injury to another. *State v. Constatine*, 43 Wash. 102, 86 Pac. 384. The defendants were bound to use reasonable care to protect their patrons. *George v. Gobey*, 128 Mass. 289, 35 Am. Rep. 376; *Curran v. Olson*, 88 Minn. 307, 92 N. W. 1124, 97 Am. St. 517, 60 L. R. A. 733; *Rommel v. Schambacher*, 120 Pa. St. 579, 11 Atl. 779, 6 Am. St. 732. The defendants were liable for the injury done plaintiff by their bartender in the use of a dangerous agency placed by them in the latter's custody. *Galveston etc. R. Co. v. Currie* (Tex.), 96 S. W. 1073; *Barmore v. Vicksburg etc. R. Co.*, 85 Miss. 426, 38 South. 210, 70 L. R. A. 627; *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312, 56 Pac. 358, 74 Am. St. 602, 44 L. R. A. 508; *Pittsburgh etc. R. Co. v. Shields*, 47 Ohio St. 387, 24

[1]Reported in 98 Pac. 1119.

N. E. 658, 21 Am. St. 840, 8 L. R. A. 464; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Salisbury v. Erie R. Co.*, 66 N. J. L. 233, 50 Atl. 117, 88 Am. St. 480, 55 L. R. A. 578; *Armstrong v. Cooley*, 10 Ill. 509; *Ellegard v. Ackland*, 43 Minn. 352, 45 N. W. 715; *Smith's Adm'x v. Middleton*, 112 Ky. 588, 66 S. W. 388, 99 Am. St. 308, 56 L. R. A. 484. A master is liable for the malicious acts of the servant towards a third person where the acts in themselves were a violation of the duty owed by the master to the party injured. *Southern R. Co. v. Chambers*, 126 Ga. 404, 55 S. E. 37, 7 L. R. A. (N. S.) 926; *New Ellerslie Fishing Club v. Stewart*, 29 Ky. Law 414, 93 S. W. 598; *Bergman v. Hendrickson*, 106 Wis. 434, 82 N. W. 304, 80 Am. St. 47; *Bowen v. Illinois Cent. R. Co.*, 136 Fed. 306; *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 41 Am. St. 440, 24 L. R. A. 483; *Mallach v. Ridgley*, 9 N. Y. Supp. 922; *Collins v. Butler*, 83 App. Div. 12, 81 N. Y. Supp. 1074.

Welsh, Welsh & O'Phelan, for respondents. The defendants' saloon was not a disorderly house. *Hackney v. State*, 8 Ind. 494; *Commonwealth v. Cobb*, 120 Mass. 356; *State v. Williams*, 30 N. J. L. 102; *Thompson v. State*, 2 Tex. App. 82; *Beard v. State*, 71 Md. 275, 17 Atl. 1044, 17 Am. St. 536, 4 L. R. A. 675; 9 Am. & Eng. Ency. Law (2d ed.), p. 522; *Mossman v. City of Fort Collins*, 40 Colo. 270, 90 Pac. 605, 11 L. R. A. (N. S.) 842; 14 Cyc. 482, Liquor selling is a legitimate vocation. *State v. Brown*, 7 Wash. 10, 34 Pac. 132. A saloon keeper is not liable for an assault on a patron committed by a bartender. *Chase v. Knabel*, 46 Wash. 484, 90 Pac. 642; *Anderson & Co. v. Diaz*, 77 Ark. 606, 92 S. W. 861, 113 Am. St. 180, 4 L. R. A. (N. S.) 649; *Rahmel v. Lehndorff*, 142 Cal. 681, 76 Pac. 659, 100 Am. St. 154, 65 L. R. A. 88; *Clancy v. Barker*, 131 Fed. 161; *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148; Cooley, Torts (2d ed.), p. 627; *McCarthy v. Timmins*, 178 Mass. 378, 59 N. E. 1038, 86 Am. St. 490; *Bowen v. Illinois Cent. R. Co.*, 136

Fed. 306. There is no statutory liability. *Gage v. Harvey*, 66 Ark. 68, 48 S. W. 898, 74 Am. St. 70; 43 L. R. A. 143. And no common law liability. Black, Intoxicating Liquors, § 281; *Cruse v. Aden*, 127 Ill. 231, 20 N. E. 73, 3 L. R. A. 327; *Struble v. Nodwift*, 11 Ind. 64. The cruel act of the bartender was beyond the scope of his employment. Cooley, Torts (2d ed.), p. 627; *McManus v. Crickett*, 1 East. 106; *Davis v. Houghtellen*, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737; *Britton v. Atlantic etc. R. Co.*, 88 N. C. 536, 43 Am. Rep. 749; *Howe v. Newmarch*, 94 Mass. 49; *Clancy v. Barker*, 131 Fed. 161; *Curtis v. Dinneen*, and *Bowen v. Illinois Cent. R. Co., supra; St. Louis Southwestern R. Co. v. Harvey*, 144 Fed. 806; 20 Am. & Eng. Ency. Law (2d ed.), 167; *Robinson v. McNeil*, 18 Wash. 163, 51 Pac. 355; *Driscoll v. Scanlon*, 165 Mass. 342, 43 N. E. 115, 52 Am. St. 523; *Bowler v. O'Connell*, 162 Mass. 319, 38 N. E. 498, 44 Am. St. 359, 27 L. R. A. 173; *Walker v. Hannibal etc. R. Co.*, 121 Mo. 575, 26 S. W. 360, 42 Am. St. 547, 24 L. R. A. 363; *Sullivan v. Louisville & N. R. Co.*, 115 Ky. 447, 74 S. W. 171, 103 Am. St. 330. The master is not liable for an assault and battery committed by a servant on a third person, when the servant acts outside of the scope of his employment. 20 Am. & Eng. Ency. Law (2d ed.), 175; *Illinois Cent. R. Co. v. Ross*, 31 Ill. App. 170; *Terre Haute etc. R. Co. v. Jackson*, 81 Ind. 19; *Hudson v. Missouri etc. R. Co.*, 16 Kan. 470; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 3 South. 631, 8 Am. St. 512; *Central R. Co. v. Peacock*, 69 Md. 257, 14 Atl. 709, 9 Am. St. 425; *McGilvray v. West End St. R. Co.*, 164 Mass. 122, 41 N. E. 116; *Johanson v. Pioneer Fuel Co.*, 72 Minn. 405, 75 N. W. 719; *Alabama etc. R. Co. v. McAfee*, 71 Miss. 70, 14 South. 260; *Davis v. Houghtellen*, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737; *Kaiser v. McLean*, 20 App. Div. (N. Y.) 326; *Little Miama R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 273; *Scanlon v. Suter*, 158 Pa. St. 275, 27 Atl. 963. A servant, though in charge

of a dangerous agency, who acts without any reference to the service for which he is employed and not for the purpose of performing the work of his employer, but to effect some independent purpose of his own, does not render his master responsible either for his wrongful act or omission. *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 29 Pac. 234, 27 Am. St. 223, 15 L. R. A. 475; *Evers v. Krouse*, 70 N. J. L. 653, 58 Atl. 181, 66 L. R. A. 592; *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 147, 28 South. 823, 84 Am. St. 620; *St. Louis Southwestern R. Co. v. Harvey, supra; Morier v. St. Paul etc. R. Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; *Sullivan v. St. Louis etc. R. Co.*, 115 Ky. 447, 74 S. W. 171, 103 Am. St. 330.

HADLEY, C. J.—This is an action for damages for personal injuries. The cause came on for trial before a jury, and at the close of the testimony submitted by the plaintiff, the defendants moved that the court discharge the jury and enter judgment in favor of the defendants. The motion was granted on the ground that the evidence was insufficient to sustain a verdict for plaintiff, and judgment was entered dismissing the action. The plaintiff has appealed.

Appellant's testimony showed the facts hereinafter stated, and it is even conceded in respondents' brief that such facts appeared in evidence. The respondents, John Carroll and William Carroll, were, on and prior to January 15, 1908, copartners under the firm name and style of Carroll Brothers, conducting a saloon in the city of Raymond, Washington, in which liquors were sold at retail under a license duly issued by said city. William Esswein, who was made a codefendant in this action with the Carrolls, was in the employ of the latter as their servant, and was acting as bartender. On the date above named, the appellant entered the saloon, purchased and drank a glass of beer, and immediately thereafter left the barroom and entered an adjoining room, where he sat down in a chair and fell asleep. While asleep, Esswein, the servant

and bartender, poured alcohol in appellant's shoe which was on his right foot, and set fire to the alcohol which burned the foot. At the time of the occurrence, neither of the Carrolls was present and neither one had knowledge of the act of the servant. Esswein, the servant, was never served with summons in the case, and did not appear in the action.

Appellant's amended complaint, upon which the action was tried, was drawn upon the theory that the respondents were responsible for the acts of their servant at the time mentioned, and that they are liable in damages for the injuries received by appellant as the result of the servant's act. Respondents, upon the other hand, contend that the act of their employee was entirely without the scope of the duties included within his employment, and that inasmuch as it was done without their knowledge, consent, or acquiescence, they cannot be liable.

If respondents had been present upon the saloon premises and in the immediate charge thereof at the time, perhaps the doctrine that the employer cannot be made liable for the act of his servant committed wholly without the scope of the duties of the employment might have applied. However, under the circumstances shown by the facts in this case, the employee became at the time more than a mere ordinary servant acting under the immediate instructions of the master. The master had left the place in entire charge of this servant, late at night, while it was yet open to the public and while patrons were still invited to enter to transact business and to receive the customary treatment accorded to customers. The master cannot start a saloon to going and then go off and leave it to take care of itself. In contemplation of law, he must either be present in person or by some one who represents him and who for the time being stands in his shoes and acts in his behalf. The policy of the state toward the saloon business is such that the owner of a saloon cannot be permitted to absent himself from his place of business and then escape liability to the customers of his saloon for injuries received in the man-

ner that appellant was injured, merely because the owner is not present, has not personal knowledge of the act, and does not actually consent thereto. The business of selling intoxicating liquors in this state is placed under many restraints by law, among which are the requirements that the vendor must procure a license and must give a bond conditioned to keep an orderly house. Here was a customer who, as shown by the evidence he submitted—and there was no other testimony—quietly entered the saloon at a late hour of the night, bought and drank a glass of beer, unobtrusively and peaceably sat down in a chair provided for that purpose for customers, and simply fell asleep. Under such circumstances he had a right to rely upon the belief that he was in an orderly house and would receive the protection of such an one. He had a right to rely upon the belief that the master was either present in person or by a responsible and delegated representative, keeping a careful lookout that the doings in the house should in all respects be orderly. The act in question cannot be called an orderly one. It was essentially an extremely disorderly one, and was committed directly by the person then in charge of the place. Under such circumstances, we think it should be held that the employee in charge was the employer's delegated representative for that purpose, and that inasmuch as the employers were charged by law with the duty of preventing disorderly conduct in their place of business, they must be liable when the act was actually committed by the person whom they had placed in control.

The case of *Curran v. Olson*, 88 Minn. 307, 92 N. W. 1124, involved facts quite similar to those in the case at bar, the circumstances in the case before us being, if any different, more aggravating in appellant's favor than were those in the cited case. In that case a party who had been a patron of the saloon for some days, and who had spent all his money, went into the saloon at about 1:30 a. m., and fell asleep in his chair. A cook, in a restaurant in the rear of the saloon belonging to a third party, went into the saloon, got alcohol

from the bartender in charge of the room, poured it upon the foot of the sleeping man, and set it on fire, causing serious injury. It is stated in the opinion that the evidence tended to show that the bartender knew, or might have known by the exercise of the slightest care, for what purpose the alcohol was to be used, and that he could have prevented the injury. Neither of the proprietors was present at the time. It will be seen that the thing was actually done by one not even in the employ of the proprietors of the saloon, but the court said:

"The defendants were bound to use reasonable care to protect their guests and patrons from injury at the hands of vicious or lawless persons whom they knowingly permitted to be in and about their saloon. If they delegated this duty to their barkeeper, they are responsible for his negligence in the premises. *Mastad v. Swedish Brethren*, 83 Minn. 40, 85 N. W. 913. The evidence is ample to sustain a finding by the jury that the defendants were guilty of negligence, which was the proximate cause of the plaintiff's injury."

As we have intimated, the wrong done in the case at bar was even worse, so far as it involved the proprietor, than was that in the Minnesota case, for the reason that in the present case the wrong was actually committed by the delegated representative of the owner who was at the time in entire charge. It is true that, in the case of *Anderson & Co. v. Diaz*, 77 Ark. 606, 92 S. W. 861, the facts were essentially the same as in the case at bar. The bartender assisted a patron to place alcohol upon the foot of another patron who was asleep, and then set it on fire. The holding there was agreeable to respondents' contention here, to the effect that the act was without the scope of the servant's duties, and that the employer was not liable. For the reasons we have already stated, however, we think the Minnesota decision is based upon sound principles, and we decline to follow the Arkansas decision.

We think the court erred in granting the challenge to

appellant's evidence, and the judgment is therefore reversed, and the cause remanded with instructions to grant a new trial.

CROW, DUNBAR, and FULLERTON, JJ., concur.
RUDKIN and CHADWICK, JJ., took no part.

[No. 7555. Decided January 6, 1909.]

THOMAS J. LILLIS, *Respondent*, v. E. STEINBACH, *Appellant*.[1]

VENDOR AND PURCHASER—RESCISSION BY VENDOR—CONTRACTS—DEFAULT IN PAYMENT—WAIVER. Time is not made the essence of a contract for the purchase of property by a provision that the balance of the purchase price shall be "payable $5 and interest . . . on deferred payments monthly," where it was further provided that payments were to be made in work by the purchaser, who was a brick mason; and the same cannot be rescinded by the vendor for defaults in payment prior to the expiration of the contract, where for two years payments had not been made monthly but work had been accepted at irregular intervals.

SAME—ABANDONMENT BY VENDEE. Abandonment of a contract to purchase real estate is not shown by the fact that the vendee for two years made none of the five-dollar monthly payments which were to be made in work, as near as could be, when the bid was as low as other bids, where, having paid in work for some time, the vendee twice offered work which was rejected, and thereafter failed to offer work for two years and failed to pay taxes which he had agreed to pay, the time for final payment not having expired and time not being of the essence of the contract.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered March 28, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on contract. Affirmed.

Boyle, Warburton, Quick & Brockway, for appellant.

L. C. Whitney, for respondent.

[1]Reported in 99 Pac. 22.

MOUNT, J.—Respondent brought this action against appellant to recover damages for a breach of contract for the sale of two lots in Tacoma. The cause was tried to the court without a jury. Findings were made in favor of the plaintiff, and a judgment entered for $510 against the defendant, who appeals.

The facts are as follows: In the year 1903 the respondent agreed to purchase from the appellant two lots in Tacoma. The contract was evidenced by a writing as follows:

"$14.00. Tacoma, Wash., July 18, 1903.

"Received from Mr. Thomas J. Lillis, the sum of thirteen 85-100 dollars, being for first payment on lots 26 and 27, Bl. 80, Buckley Add. Purchase prin. $250.00, balance $236.10, payable $5.00 and interest at 7 per cent per annum on deferred payments monthly. Full warranty deed and abstract given on final payment and all taxes payable to date to be paid. It is understood that the payments as near as can be are to be taken in work when price is as low as lowest other bidder.

"Purchase Prin. $250.00
"Paid Prin. 14.00
"Balance 236.00

"Int. 7 per cent. E. Steinbach."

Thereafter payments were made by the respondent on the contract as follows: September 13, 1903, $15.40; September 28, 1903, $10; July 28, 1904, $22.50. At the time of the last-named payment, $12.50 thereof was paid as interest to that date, leaving $10 to apply on the principal. These amounts were all paid in work. No further payments were made by the respondent, but in the year 1905 he made bids on two different pieces of work for the appellant, who rejected the bids. Appellant thereafter did not offer the respondent any more work. During the year 1905 the appellant sent to respondent through the mail three notices, to the effect that unless prompt payment was made on the contract the same would be forfeited. Respondent did not receive any of these notices. In the latter part of the year

1905, appellant sold the lots to another party without the knowledge of the respondent. Appellant paid taxes and street improvements on the lots, amounting to $60 or $70. In May, 1907, some three months before the last payment became due under the contract, the respondent tendered to the appellant in coin the balance due on the contract, including interest and taxes, etc., paid by appellant, and respondent thereupon demanded a deed of the property. Appellant then informed respondent that he had terminated the contract in the year 1905, and had re-sold the property, and refused to receive the tender or to deliver the deed. Respondent then brought this action for damages. The lots were vacant, unimproved city lots, and were of the value of $800 at the time the tender was made.

The trial court was of the opinion that time was not of the essence of the contract in the payment of the installments, and that the appellant therefore could not rescind the contract until after the last installment became due. The trial court was clearly right in so holding. There is no express provision making time the essence of the contract, and no provision which necessarily implies that time is of the essence. The only provision from which this may be inferred is the one which states, "payable $5 and interest . . . on deferred payments monthly." But this provision, read in the light of the provision that "payments as near as can be are to be taken in work when price is as low as lowest other bidder." indicates quite clearly that the parties did not intend that these monthly payments should be made on the day they became due. Respondent was a brick mason, and it is not to be supposed that he was to work only one day or part of a day each month for the appellant. The parties no doubt intended that the amounts should be paid in work as near as could be, and that payments might be made in advance or in arrears as was convenient. In addition to this common-sense view of the contract, this is clearly evidenced by the payments made. The contract was executed in July, 1903. No payment was

made in August, and no complaint was heard on account of that fact. In the next month, September, $15.40 was paid in work. This paid three months in advance. Then nothing more was paid until July 28, 1904, when the payments were seven months in arrears. At that time $22.50 was paid in work, $12.50 of which went to pay back interest due. No complaint was then made, and nothing was done or said which would indicate that the parties supposed that time was of the essence of the contract. It is clear therefore that the contract does not necessarily imply that time is of the essence of it, and it is also clear that the parties themselves did not so construe it or consider it. Under these facts it will not be held that time is the essence of the contract. *Lambert v. Ross*, 1 Wash. 250, 24 Pac. 443; *Thacker Wood & Mfg. Co. v. Mallory*, 27 Wash. 670, 68 Pac. 199. The case of *Voight v. Fidelity Investment Co.*, 49 Wash. 612, 96 Pac. 162, relied upon by the appellant, was a case where time was expressly made the essence of the contract, and is therefore not in point here.

We think the evidence fails to show that the respondent abandoned the contract. The lots were vacant, unimproved lots. The respondent testified that he relied upon the promise of appellant to give him work, and that he held himself in readiness to pay in work, but that appellant offered him no work after the year 1905, and gave him none in that year. The fact that respondent neglected to pay the taxes and street improvements when they became due is not sufficient to show abandonment, because respondent did not agree to keep the taxes paid, but he offered to repay these expenses before the expiration of the contract. The fact that he was slow in making the payments does not necessarily show an abandonment. Under the contract, as we have held above, he had the whole time within which to pay the purchase price. The fact that notices were sent to him did not rescind the contract, because the appellant then had no right to rescind.

We think the judgment was right, and it is therefore affirmed.

DUNBAR, RUDKIN, and FULLERTON, JJ., concur.

[No. 7476. Decided January 6, 1900.]

ALMIRA MAGEE *et al.*, *Appellants*, v. BIG BEND LAND COMPANY, *Respondent*.[1]

EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE—ADMINISTRATION OF COMMUNITY PROPERTY. In the administration upon the estate of a widower, without there having been any previous administration upon the estate of his deceased wife, the court has jurisdiction to administer the whole of their community property.

JUDGMENTS—CONCLUSIVENESS—COLLATERAL ATTACK. An action to quiet title and recover possession of land sold at an administrator's sale, alleged to have been made without jurisdiction, is a collateral attack upon the probate proceedings.

COURTS—JURISDICTION—PRESUMPTIONS—JUDGMENTS. Upon a collateral attack of a proceeding in a court of general jurisdiction, jurisdiction will be presumed unless the contrary appears of record.

COURTS—JURISDICTION—EXECUTORS AND ADMINISTRATORS—SALE—COLLATERAL ATTACK—JUDGMENTS. The territorial probate court being a court of record, having a seal, with exclusive original jurisdiction over probate proceedings, its judgments therein need not affirmatively show the existence of facts upon which the exercise of jurisdiction depends, but the same are presumed unless the contrary appears; hence an administrator's sale of real estate and confirmation thereof by such court cannot be collaterally attacked for failure to appoint a guardian *ad litem* and give notice to a minor, such defects not appearing on the record.

EXECUTORS AND ADMINISTRATORS—SALE OF REAL ESTATE—JURISDICTION—PETITION. A petition for an administrator's sale of real estate to pay debts sufficiently shows jurisdiction to make the sale, where it appears that the personal property, consisting of stock, was lost without fault of the administrator, the money having been expended in an effort to save the stock, that no personal property remains in his hands, and that there is no way to pay the debts except by sale of the real estate.

[1]Reported in 99 Pac. 16.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered January 2, 1908, dismissing on the merits an action to quiet title, etc., after a trial before the court without a jury. Affirmed.

Martin & Wilson, for appellants.

H. J. Hibschman and *Merritt, Oswald & Merritt*, for respondent.

DUNBAR, J.—In the year 1883, Frank Rusho and his wife, Magdalene Rusho, purchased and moved upon the land involved in this suit, which was in Douglas county, Washington. Mrs. Rusho died in said Douglas county in the year 1887. Her estate was not probated up to the time of her husband's death, to wit, in 1889. A married daughter, whose name was Melder, died leaving surviving her the plaintiff Archie D. Melder, and it is not shown by the record that a guardian was appointed for said Archie D. Melder during the times hereinafter spoken of. In the early part of the year 1889, Frank Rusho moved from Douglas county to the county of Stevens, where he died June 16, 1889. The plaintiffs, save Melder, who was a grandchild, are all children of the said Frank Rusho and his wife, and a majority of them were minors when their parents died. After the death of the father, an administration of his estate took place in Stevens county, out of which an order of sale was issued, purporting to sell the real estate to the respondent for $1,400. For the purpose of removing a cloud from the real estate above set out, and to recover the rents and profits and the possession of the land, this action was commenced by the plaintiffs against the defendant. An answer was filed and a reply, and on the 11th day of September, 1907, at Waterville, Douglas county, said action was tried and a decree rendered dismissing the action and refusing the plaintiffs, the appellants here, relief of any kind. From this judgment, this appeal is taken.

Several errors are assigned by the appellants, but they all revolve around the question of whether the court had jurisdiction to sell the land which is the subject of the controversy. If it did, then the judgment of the lower court should be affirmed; if it did not, it should be reversed. The respondent set up two affirmative defenses, basing its title to the land, (1) on a sale made by the administrator of the estate of Frank Rusho; and (2) on an estoppel based on a distribution to the heirs of the money paid by it to the administrator. Evidence was introduced showing the facts stated in relation to the residence and death of Frank Rusho and his wife, and of their acquisition of the land mentioned.

It is earnestly contended by the appellants that the real property in controversy was the community property of Rusho and wife, and that the administration of the estate by Magee, who was appointed administrator by the probate court of Stevens county, was only an administration of the estate of Frank Rusho; that he had no authority under the probate proceedings to administer the estate of Magdalene Rusho, and that the proceedings thereunder, so far as her estate was concerned, were void and of no force and effect. In *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910, we held that upon the death of either husband or wife, where an administration was had of the community property, the same should be of the whole thereof and not merely of the half interest of the decedent, and that the whole community estate is subject to administration upon the death of either of the parties. To the same effect is *In re Hill's Estate*, 6 Wash. 285, 33 Pac. 585. So that, conceding the community character of the estate, under the authorities above mentioned it was subject to probate under Magee's administration.

It is, however, contended that the court acted without jurisdiction in this case, for the reason that the petition for the sale of the real estate did not conform to the requirements of the statute, and that the record does not show that Archie D. Melder, a minor, was ever served with notice of

the probate proceedings, and especially of the sale of said land. It must be conceded that this is a collateral attack (Van Fleet on Collateral Attack, §3), and that in such cases the action of the court can be attacked only on questions of jurisdiction. As to courts of general jurisdiction, the great weight of authority is to the effect that jurisdiction will be presumed unless the contrary appears of record. If that rule is applicable to the old probate territorial courts, then the appellants have no standing, for it does not affirmatively appear by the record in any way, that the minor heir was not notified of all the essential actions of the court. There is no proof that the minors had no general guardian or guardian *ad litem*, or that notice was not served on the guardian, or that there was no voluntary appearance. On this subject the record is silent, but the judgment is to the effect that all jurisdictional requirements have been met.

To determine the standing of the probate court, we must examine the jurisdiction that was conferred upon it by the law-making power. In chapter 95 of the Code of 1881, under the title "Probate Practice Act," provision is made for the appointment of a probate judge and the formation of a probate court. Section 1299 of said chapter provides that the said probate court shall have and possess the following powers: (1) Exclusive original jurisdiction within their respective counties in all cases relative to the probate of last wills and testaments; (2) the granting of letters testamentary and of administration, and revoking the same. After conferring other powers, it is provided in subd. 8, that "the said court shall provide and keep a suitable seal, that the court established by this act shall be a court of record, and shall keep just and faithful records of its proceedings, and shall have power to issue any and all writs which may be necessary to the exercise of its jurisdiction." While in a sense general jurisdiction was not given to this court, exclusive original jurisdiction was given to it over the subject mentioned, viz., probate proceedings, and it is well established that such

jurisdiction as this carries with it the presumption of the integrity of the judgment, the same as does the judgment of a court of general jurisdiction.

"In so far as probate courts have general jurisdiction their records need not affirmatively show the existence of facts upon which the exercise of their jurisdiction depends. And the rule applies even though the court is one of limited jurisdiction where it is invested with full authority over probate and testamentary matters and is a court of record." 11 Cyc. 697.

The rule is again laid down in 11 Cyc., at page 694, as follows:

"The rules as to the presumption in favor of the jurisdiction of courts of general jurisdiction apply to courts of probate and those with like powers, where they are courts of general jurisdiction or possess the attributes thereof, even though they have not exclusive jurisdiction or have a limited, but not a special, jurisdiction, or their powers are limited to certain specified subjects."

It was held in *State ex rel. Bell v. Nolan*, 99 Mo. 569, 12 S. W. 1047, in accordance with this general announcement, that in so far as probate courts have general jurisdiction, their records need not affirmatively show the existence of facts upon which the exercise of their jurisdiction depended, and that the rule applies even though the court is one of limited jurisdiction where it is vested with full authority over probate and testamentary matters, and is a court of record. It cannot be questioned that our territorial probate court was a court of record, for the statute specially requires it to keep a record, and that it had full authority over probate and testamentary matters. It therefore must follow that, unless it affirmatively appears that the court acted without jurisdiction in some matters subsequent to the inauguration of the probate proceedings, the judgment of the probate court in selling and confirming the sale of the land must be presumed to have been based on jurisdiction conferred. The case of *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099, is cited and largely relied upon by the appellants, and at first glance

that case might seem to be in point, but a closer investigation shows that, while it was there determined that the action of the court in selling the land where no guardian had been appointed for a minor and no notice given was illegal and void; yet in that case there was no discussion of the presumption of jurisdiction, for it was an established and admitted fact that no guardian had been appointed and no notice given as required by the law.

It is contended, however, by the appellants that the record affirmatively shows that the petition for the sale of real estate did not contain the requirements of the statute, but in this we are satisfied from an examination of the exhibit that the appellants are mistaken, and that all the material requirements of the statute were met. It is true that the petition does not state that there had been no personal property, or that it had been sold, but it does state that there was no way to pay the debts of the community except by the sale of real estate, and that the personal property consisting of live stock had been lost without fault of his. The particular portion of the petition was as follows:

"That at the time your petitioner was appointed, the said cattle and horses belonging to said decedent's estate were in the Kalispell Valley, state of Washington, where the said deceased had taken them prior to his death, and made some temporary arrangements for their care, during the winter of 1889 and 1890, that during said winter of 1889 and 1890, owing to the unusual severity and length of the winter, and owing to the unusual severity of the cold weather and great depth of fall of snow, notwithstanding the best efforts of your petitioner all of said stock were lost, through no fault of his, and in endeavoring to save said cattle, your petitioner expended the greater portion of said money belonging to said estate, and no personal property now remains in the hands of your petitioner belonging to said decedent's estate."

The petition further proceeds to show the condition of the estate, and the necessity for selling the land to meet the

expenses. We think the petition was amply sufficient to give the court jurisdiction to order a sale of the real estate.

The view we take of the jurisdictional question renders unnecessary the discussion of the further contention of the respondent that the appellants are estopped from bringing this action by reason of having received the proceeds of the sale of the land, the appellants at that time all appearing at the decree of distribution, the minor Archie D. Melder appearing by his guardian *ad litem*.

The judgment will be affirmed.

CROW, MOUNT, and FULLERTON, JJ., concur.

[No. 7486. Decided January 6, 1909.]

JOSEPH DIGNAM, *Respondent*, v. ALICE M. SHAFF, *Appellant*.[1]

APPEAL—REVIEW—WAIVER OF NONSUIT. Where the refusal of a nonsuit is waived by the defendant's entering upon her case, the supreme court will review all of the evidence.

LIMITATION OF ACTIONS — ABSENCES FROM STATE — DOMICILE. A judgment debtor is a nonresident of this state, within the meaning of Bal. Code, § 4808, tolling the statute of limitation during absence from this state, where she had her abode in Idaho and rented a house and taught school there since 1897, living with her daughter as the only member of her family, and only returned to this state to spend her vacation after being elected to teach in Idaho for another year; her visits to this state not being to the same place, nor to the farm where she claimed her home, the dwelling house thereon having been destroyed, and there being no usual place of abode in this state where service of process could be made upon her.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered March 3, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action upon a judgment. Affirmed.

[1]Reported in 98 Pac. 1113.

John O. Bender, for appellant, contended, *inter alia*, that the burden was on plaintiff to prove that the defendant resided continuously out of the state. *Crissey v. Morrill*, 125 Fed. 878. The defendant was a resident of Washington, and departed therefrom merely for business in the state of Idaho, and she did not by such absence acquire a residence or reside in Idaho, since it was her purpose to return to her home in Washington. *Dupuy v. Wurtz*, 53 N. Y. 556; *People v. Platt*, 117 N. Y. 159, 22 N. E. 937; *De Meli v. De Meli*, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. 652; *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117; 25 Cyc. 1246, 1247, 1248; *Barney v. Oelrichs*, 138 U. S. 529, 11 Sup. Ct. 414, 34 L. Ed. 1037; *Hart v. Kip*, 148 N. Y. 306, 42 N. E. 712. It was incumbent on the plaintiff to allege and prove that the defendant was not a resident of the state of Washington, and that she did not leave any usual place of abode within such state, where service of process could be had upon her. *Crissey v. Morrill, supra; McMillan v. Cheeney*, 30 Minn. 519, 16 N. W. 404; *Young v. Whittenhall*, 15 Kan. 579; *Zane v. Zane*, 5 Kan. 134. Where a resident goes out of the state, but with the intention of returning, he is regarded as still a resident of that state, and the fact of his absence therefrom will not prevent substituted service of process upon him. 19 Ency. Plead. & Prac. 623. The usual abode as used in the statutes regulating substituted service means a residence into which the person, still a resident of the state, has moved in that state last before the service of process. 18 Ency. Plead. & Prac. 627.

Ben F. Tweedy, Elmer E. Halsey, and *S. G. and H. G. Cosgrove*, for respondent, contended, among other things, that the defendant became a nonresident of Washington when she had no abode in the state where substituted service of summons could be made. *Hackett v. Kendall*, 23 Vt. 275; *State v. Furlong*, 60 Miss. 839; *Johnson v. Smith*, 43 Mo. 499; *Ward*

v. Cole, 32 N. H. 452, 64 Am. Dec. 378; *Gilman v. Cutts*, 23 N. H. 376; *Langdon v. Doud*, 83 Mass. 423, 83 Am. Dec. 641; *Sleeper v. Paige*, 81 Mass. 349; *Collester v. Hailey*, 72 Mass. 517; *Conrad v. Nall*, 24 Mich. 275; *Campbell v. White*, 22 Mich. 178; *Dent v. Jones*, 50 Miss. 265; *French v. Davis*, 38 Miss. 218; *Miller v. Tyler*, 61 Mo. 401; *Venuci v. Cademartori*, 59 Mo. 352; *Garth v. Robards*, 20 Mo. 523, 64 Am. Dec. 203; *Bensley v. Hachberle*, 20 Mo. App. 648; *Rhodes v. Farish*, 16 Mo. App. 430; *Quarles v. Bickford*, 64 N. H. 425, 13 Atl. 642; *Gray v. Fifield*, 59 N. H. 131; *Bell v. Lamprey*, 52 N. H. 41; *Brown v. Rollins*, 44 N. H. 446; *Ward v. Cole*, 32 N. H. 452, 64 Am. Dec. 378; *Rutland Marble Co. v. Bliss*, 57 Vt. 23. When defendant acquired an abode in another state "entered upon with the intention to remain permanently, at least, for a time for business or other purpose," she did not start the statute to run in her favor by temporary returns to the state of Washington; but during all that time she must be counted as absent from this state. *Rockwood v. Whiting*, 118 Mass. 337; *Murray v. Fisher*, 5 Lans. 98; *Gans v. Frank*, 36 Barb. 320; *Burroughs v. Bloomer*, 5 Denio 532; *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210; *Brooks v. Fowler*, 82 Ga. 329, 9 S. E. 1089; *Hacker v. Everett*, 57 Me. 548; *Converse v. Johnson*, 146 Mass. 20, 14 N. E. 925; *Whitton v. Wass*, 109 Mass. 40; *Milton v. Babson*, 88 Mass. 322; *McCord v. Woodhull*, 27 How. Prac. 54; *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347; *Stanley v. Stanley*, 47 Ohio St. 225, 24 N. E. 493, 21 Am. St. 806, 8 L. R. A. 333; *Lyman v. First Nat. Bank*, 6 Kan. 74; *Smith v. Heirs*, 8 Ala. 386; *Bell v. Lamprey*, 57 N. H. 168; *Connecticut Trust & Safe Deposit Co. v. Wead*, 172 N. Y. 497, 65 N. E. 261, 92 Am. St. 756; *Lawrence v. Hogue*, 105 App. Div. 247, 93 N. Y. Supp. 998; *Bennett v. Watson*, 21 App. Div. 409, 47 N. Y. Supp. 569.

DUNBAR, J.—This action was brought on a judgment recovered in the superior court of the state of Washington for Garfield county on the 6th day of October, 1892, against

the defendant. It is alleged in the complaint that the defendant, Alice M. Shaff, after the rendition and filing of said judgment, departed from and has resided out of the state of Washington continuously since and before the 1st day of September, 1897, and has resided continuously during said time in the state of Idaho. In her answer the defendant denies the allegation, and alleges that she has been in the state of Washington for more than six years since the rendition and filing of said judgment, and that said cause of action is barred by the provisions of §4798 of Ballinger's Code (P. C. § 281). Judgment was entered for the plaintiff, and the defendant appeals.

The only question raised by the assignments of error in this case is, whether the appellant was a resident of Idaho, or more strictly speaking, a nonresident of this state, within the meaning of Bal. Code, §4808 (P. C. §292), which provides as follows:

"If the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action."

The assignment that the court erred in not granting a nonsuit asked for by the appellant depends upon the same fact. The appellant not standing upon her motion, but seeing fit to enter upon her defense, the court will review all the testimony for the purpose of determining the case.

The testimony in this case is meager, but we think it justifies the findings and conclusions of the court. There is really no dispute about the facts. It appears, that the appellant had her abode in Idaho from the 5th day of September, 1897, to the time of the commencement of this action;

purposes, to constitute a residence within the legal meaning of that term."

In discussing *Burroughs v. Bloomer*, 5 Denio 532, it was said:

"But mere presence was not tantamount to residence under the statute, nor mere absence equivalent to residence elsewhere. And the occasional absences of a resident of the state continuing to reside therein were not to be deduced in computing the statutory term."

Other cases to the same effect are cited. Very different is the case at bar, where there was a permanent employment for years, each employment being for the period of one school year at least, with the evident intention on the part of the appellant to make it permanent if possible. A permanent abode was provided and occupied as a home, the house which was rented being retained by appellant and the rent paid by her during the brief periods when she was away in the vacation season.

We think the testimony fully sustains the conclusion reached by the court, and the judgment is affirmed.

MOUNT, CROW, RUDKIN, and FULLERTON, JJ., concur.

HADLEY, C. J., and CHADWICK, J., took no part.

[No. 7587. Decided January 6, 1909.]

GEORGE NIXON *et al.*, *Respondents*, v. JOSHUA HENDY MACHINE WORKS, *Appellant*.[1]

ASSIGNMENT—DELIVERY — ACCEPTANCE — GARNISHMENT OF CLAIMS BEFORE DELIVERY. There is not a complete assignment by an insolvent corporation of certain claims to one of its creditors, in part satisfaction of indebtedness, where it was made upon the express understanding that the assignee should give credit for all sums actually collected under the assignment, and the assignment was not delivered or made known to or accepted by the assignee until after the claims had been garnished, and where after the assignment part of the claims were paid directly to the assignor with the knowledge and consent of the assignee.

PROCESS — NONRESIDENT DEFENDANTS — PUBLICATION OF SUMMONS AND GARNISHMENT — ASSIGNMENT OF CLAIMS. The court acquires jurisdiction of nonresident defendants on service of summons by publication and the garnishment of assigned claims, where the assignment was not completed by delivery and acceptance before the issuance of the garnishment.

CORPORATIONS — INSOLVENCY — ASSETS — FRAUD UPON CREDITORS. A corporation that is not able to pay its debts in due course of business is insolvent, so far as creditors are concerned, and cannot prefer a creditor.

SAME—ASSIGNMENT IN FRAUD OF CREDITORS. Where two corporations were controlled by the same stockholders and officers, and one was used as a shield for the benefit of the other, they are not independent concerns, and an assignment of assets by one to the other is fraud upon creditors of the assignor.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 1, 1908, upon findings in favor of the plaintiffs, in garnishment for debt, after a trial before the court without a jury. Affirmed.

Wakefield & Witherspoon, for appellant.

Danson & Williams, for respondents.

DUNBAR, J.—This is an action by respondents, Nixon and Kimmel, against the Wagner-Bullock Electric Company, to

[1]Reported in 99 Pac. 11.

recover a debt due. When the action was commenced, the Northwest Light & Power Company was summoned as garnishee to answer as to any indebtedness due the Wagner-Bullock Electric Company. It answered admitting that it was indebted in the sum of $918.14. It afterwards filed an amended answer in which it was alleged that, after the filing of the original answer, it had received notice that on August 8, 1905, the claim due from it to the Wagner-Bullock Electric Company had been assigned to the Joshua Hendy Machine Works. No notice was ever given the Northwest Light & Power Company of any assignment until after this action had been brought. Service was made on the Wagner-Bullock Electric Company by publication of summons, said defendant being a nonresident. The defendant made a special appearance and made a motion to quash the service, which motion was denied. The Wagner-Bullock Electric Company failed to further appear, and its default was regularly entered.

Thereafter Joshua Hendy Machine Works entered its appearance in the cause as claimant, and filed its answer and petition, claiming said debt from the garnishee under an assignment of date August 8, 1905. To this answer plaintiffs replied, denying that any assignment had been made, and alleging that the said defendant Wagner-Bullock Electric Company was insolvent at the time of the attempted assignment; that said attempted assignment was made for the purpose of preferring or attempting to prefer one of its creditors; that there was no indebtedness due from Wagner-Bullock Electric Company to Joshua Hendy Machine Works; that the stock of said electric company was in fact owned by the Machine Works Company; that said attempted assignment was for the purpose of committing a fraud upon plaintiffs; that there was no other property of the Wagner-Bullock Electric Company within the state of Washington, and that plaintiffs are residents of the state of Washington. On these issues the case went to trial, resulting in a judgment

that the said debt from the garnishee was subject to the claim of plaintiffs; also, adjudging that there was due from the defendant Wagner-Bullock Electric Company the sum of $1,401; and ordered the said sum due from the garnishee applied to the partial satisfaction of the amount due plaintiffs.

This case involves only questions of fact. It is true some legal propositions are discussed, but they really arise from the different views taken of the facts, and we apprehend that when the facts are determined there can be no question concerning the law applicable. The appellant excepted to findings 1 and 13. Finding No. 1 is simply to the effect that the defendant was duly and regularly served with summons. No. 13 is as follows:

"That at the time of said alleged assignment the total assets of said Wagner-Bullock Electric Company consisted of said assigned claims and claims which were not assigned and which aggregate about the same amount as those assigned, and certain machinery of a value of three or four hundred dollars. That of the claims attempted to be assigned, that charged to Nixon & Kimmell for $918.14 was not an asset, and that there was not at that time anything due from said Nixon & Kimmel. That at the time of said alleged assignment the said Wagner-Bullock Electric Company was indebted at least $28,802.99 and was indebted in the sum of $1,401 to the plaintiffs in this action, Nixon & Kimmel, making a total definite indebtedness at that time of $30,202.99, and was further indebted to the Wagner Electric Company and A. C. Sproat in sums the amount of which is not disclosed by the evidence. That said Wagner-Bullock Electric Company had no way with which to pay debts in the ordinary course of business and was unable to pay them as they matured and were presented, and since the said alleged assignment was made has been able to pay on its indebtedness a sum not exceeding $25,000."

The other findings, not being excepted to, will be considered as the established facts of the case.

As to the first finding, that the defendant Wagner-Bullock Electric Company was duly and regularly served with

summons, it is the contention of the appellant that, under the rule announced in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, and which we think may be considered the established law of the land, the court never obtained jurisdiction of said defendant, for the reason that the property relied upon to give the court jurisdiction had been assigned to the appellant prior to the commencement of the action. Conceding, without deciding, that this state of facts, if true, could avail the appellant, it not having raised that question in the pleadings, and considering this question in connection with the further contention that the court erred in concluding that no complete assignment had been made to the appellant of debts due to the Northwest Light & Power Company—and this is the crucial question in the case which must determine the question of jurisdiction—we think the testimony amply sustains the facts found and conclusions reached by the court. This assignment rests upon the action of a meeting of the board of trustees of the Wagner-Bullock Electric Company on the 8th day of August, 1905. A certified copy of the resolution appears in the record, and the pertinent part of it is as follows:

"Whereas, the sum of $18,069.83 appears now to be due the Joshua Hendy Machine Works, and demand having been made for security and for its payment, and there being no immediate cash funds available, it has been suggested that certain accounts now due this corporation be assigned to said Joshua Hendy Machine Works, in part satisfaction of its claims; and

"Whereas, said Joshua Hendy Machine Works has signified its willingness to accept such an assignment in part satisfaction and on account of said indebtedness:

"Now, therefore, Resolved that the proper officers of this corporation be, and they are hereby authorized and directed to assign to said Joshua Hendy Machine Works, the following accounts now due this corporation."

Then in the list of accounts assigned appears the account of T. A. Winters, $919.75. The resolution concluded:

"The above assignment is made upon the express understanding that the Joshua Hendy Machine Works shall give this corporation credit for the sums of money actually collected and received by it under this assignment, as said sums are paid to it."

The court finds, and the finding is not excepted to, that there is no evidence that said assignment was ever delivered to the Joshua Hendy Machine Works, nor of notice conveyed to it of such assignment, nor that such assignment was ever accepted or acted upon by said Joshua Hendy Machine Works until long after the service of the writ of garnishment in this case. It is also an established fact in this case, by finding No. 12, that, after the said alleged assignment, there was collected on the said accounts mentioned in said resolution certain sums from time to time, and certain of said sums so assigned were paid direct to the said Wagner-Bullock Electric Company, with the knowledge and consent of the said Joshua Hendy Machine Works; such claims being so paid amounted to the sum of $4,936, and the money received on such claims was used in the payment of other bills and debts of said Wagner-Bullock Electric Company than that of the Joshua Hendy Machine Works.

Under this showing, this was not a complete assignment. There was no notice of the assignment conveyed to the appellant, and if it had knowledge of it—which is not shown by the record—there is no showing of any acceptance on its part. The assignment was conditional. There is no evidence that the Wagner-Bullock Electric Company ever parted with its right to possession of the accounts. It would have had a right under the showing made to have refused to execute or deliver the assignment, and the appellant would have had a right to refuse to accept it on the conditions specified. It may be stated as a general proposition that, in order to render an assignment effective, it must be communicated to the assignee and his acceptance of assent thereto be given. 4 Cyc. 29, and cases cited. In addition to the technical re-

quirement not having been complied with, the proof shows that it was not the understanding between the parties themselves that the transaction should have the force of a complete assignment. This is shown by finding No. 12 above set forth. There being no assignment prior to the commencement of the action in the garnishment proceedings, the court acted with jurisdiction.

In addition to this, we are satisfied from the whole testimony, without regard to the findings of the court, that the assignment was not made in good faith, and was therefore void as to the creditors of the corporation. If the Wagner-Bullock Electric Company was an independent concern, the evidence plainly shows that it was insolvent in that it was not able to pay its debts in due course of business, and this is the test of insolvency established by this court where the rights of creditors are involved. *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, and subsequent cases. If it was not an independent concern, its act was still a fraud upon creditors. It is impossible to read and consider all the record in this case without being impressed with the idea that the Wagner-Bullock Electric Company was a mere puppet of the Joshua Hendy Machine Works. The machine works had a total capital of 4,325 shares, 1,175 of which were owned by S. J. Hendy, and 1,332 2-3 shares were owned by John H. Hendy, the Hendys thereby controlling the policy of the machine works corporation. S. J. Hendy was the president of said corporation, Charles C. Gardner secretary, and R. Cartney vice president. S. J. Hendy, the president of the machine works company and one of the dominant stockholders, owned 1,975 of the 2,000 shares which comprised the stock of the Wagner-Bullock Electric Company. The officers of the electric company were F. J. Hendy, president; John H. Hendy, vice president, and F. J. Behnemann, who was cashier of the Joshua Hendy Machine Works, secretary and treasurer. Each corporation was conducted by five directors, three of

the directors of the Joshua Hendy Machine Works being directors in the Wagner-Bullock Electric Company. From these facts and all the circumstances surrounding the business transactions of these respective companies, we are forced to the conviction that the electric company was simply used as a shield for the benefit of the machine company, the policy and business of the electric company being controlled by the machine company. Corporations must not be allowed to defeat the ends of justice by subterfuges of this kind.

The judgment is affirmed.

MOUNT, CROW, RUDKIN, and FULLERTON, JJ., concur.

HADLEY, C. J., and CHADWICK, J., took no part.

[No. 7661. Decided January 6, 1909.]

L. G. KUMBLAD *et al.*, *Respondents*, v. JOHN H. ALLEN *et al.*, *Appellants*.[1]

PLEADING—AFFIRMATIVE DEFENSES—ISSUES AND PROOF. In an action upon a bond given to secure the plaintiffs the cost of making "necessary" improvements upon property purchased, the issue as to the necessity of improvements is raised by a general denial, and it is not error to strike out an affirmative defense that the improvements made were not necessary within the meaning of the bond.

BONDS—TO ASSURE TITLE—DEFENSES—FAILURE OF TITLE—VENDOR AND PURCHASER. It is no defense to an action upon a bond, given to assure against defects in the title to land purchased by the plaintiffs and to secure the cost of improvements to be made, that the plaintiffs knew of the defects in the title when the improvements were made by the plaintiffs, where the defects were not incurable.

SAME—DAMAGES—OFFSET OF RENTS AND PROFITS. In an action upon a bond given to assure the title to lands purchased by the plaintiffs and to secure the costs of improvements made, it is no defense that the plaintiffs had been in possession for years before ouster and had received sufficient rents and profits to offset their damages; since the true owner, and not the obligors in the bond, were entitled to recover the rents and profits.

[1]Reported in 99 Pac. 19.

APPEAL—REVIEW—PLEADINGS—AMENDMENTS. Where findings are not excepted to, the supreme court will treat the complaint as amended to conform to the proofs.

Appeal from a judgment of the superior court for King county, Yakey, J., entered April 21, 1908, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action upon a bond. Affirmed.

James A. Dougan, for appellants.

Graves, Palmer & Murphy and *Charles H. Winders*, for respondents.

FULLERTON, J.—In April, 1898, the appellants, Allen and wife, believing themselves to be the owners of certain real property situated in King county, in this state, contracted to sell the same to the respondents for a consideration of $500. An abstract of title was furnished the respondents by Allen and wife, which showed an action pending affecting the title, the prosecution of which had been suspended by the written agreement of all of the parties, in which agreement it was provided that, if Allen and wife paid certain sums of money on certain dates therein specified, the action should be dismissed and the title of the Allens perfected; otherwise it should proceed to trial on the issues joined. As security against a possible failure of title by reason of this action, the appellants Allen and wife offered, in addition to a warranty deed to the property, to execute a bond in the sum of one thousand dollars with C. H. Lilly and Charles Louch, as sureties, conditioned to secure the respondents in the quiet and peaceful enjoyment and possession of the property. Thereupon the sale was completed by the respondents paying the purchase price, and the appellants Allen and wife executing a warranty deed conveying the property to the respondents and executing a bond in their behalf as follows:

"Know all men by these presents, that we, John H. Allen and Lucy A. Allen, his wife, as principals, and C. H. Lilly

and Chas. Louch, as sureties, are held and firmly bound unto L. G. Kumblad in the penal sum of one thousand ($1,000) dollars, for the payment whereof, well and truly to me made, we bind ourselves, our heirs, executors and administrators, jointly and several, firmly by these presents, unto the said L. G. Kumblad and to his heirs, executors and administrators.

"Signed and sealed this 12th day of April, 1898.

"The condition of the above obligation is such that, Whereas, the above boundens, John H. Allen and Lucy A. Allen, his wife, have this day sold and conveyed unto L. G. Kumblad, the above obligee, for and in consideration of the sum of five hundred ($500) dollars, in hand paid, the receipt whereof is hereby acknowledged, the following described real estate, situated in King County, Washington, as follows, to wit:

"Being the whole piece or parcel of land lying on the east side of the right-of-way of the Northern Pacific Railroad, save and except a strip thereof fifteen feet wide on the north side of said piece of land, containing in all about 14 acres, more or less, all being contained in the N. E. 1/4 of the S. E. 1/4 of Section 25, Tp. 21 N., R. 4 E.

"And, whereas, some question has arisen as to the title of said obligors, John H. Allen and wife, of said property. Now, therefore, in order to secure the said above obligee in the purchase of said property, and the payment of said purchase money, if the above boundens, John H. Allen and wife, shall well and truly preserve and save harmless the said L. G. Kumblad, the obligee, in the quiet and peaceful enjoyment and possession of said property, and shall establish and maintain his title thereto, perfect in all respects, then, in that event, this obligation shall be null and void; otherwise of full force and effect, the said obligors agreeing, in the latter event to return and repay to the above obligee, L. G. Kumblad, the said purchase money, with interest thereon, and all his costs and expenses, and all necessary improvements made by him on said property during his occupancy thereof."

Allen and wife failed to make the payments provided for in the written stipulation, and the action was tried upon its merits, resulting in a judgment to the effect that the Allens had no title to the property. The respondents entered into possession of the property at the time of the execution of

the deed and bond, and were ousted therefrom on an execution issued on the judgment against Allen and wife. The respondents were in possession of the property under the deed and bond for some nine years, and during that time made valuable, permanent improvements thereon which were lost to them by reason of their ouster from possession.

The present action is an action on the bond to recover the penalty thereof. The respondents in their complaint alleged the contract of sale, the execution and delivery of the deed and bond, the failure of the title to the property and their ouster therefrom, the nature and character of the improvements they had placed thereon, with a special valuation of each separate item showing that the total exceeded the penalty named in the bond, and demanded judgment for the amount of such penalty.

The appellants appeared, and answering jointly, admitted the contract of sale, the execution of the deed and bond, the judgment against Allen and wife in which it was adjudicated that they had no title to the property, and the ouster of the respondents from possession, but denied that the ouster was caused by such failure of title, and denied further that the respondents had placed any improvements on the premises of the value alleged, or any value, and set up four separate defenses, the substance of which were: That the respondents knew of the condition of the title, and assumed the risk of making improvements thereon; that certain of the improvements alleged to have been made were not necessary improvements; that the planting of an orchard on the premises was not a necessary improvement, and that the respondents had been in the actual occupancy and undisturbed possession of the premises for a period of nine years, and had received the rents, issues and profits thereof and that the same were of the value of $500 per year, and greater than any damage the respondents had suffered by being ousted from the premises. The court struck out the first three separate defenses on respondents' motion, and sustained a demurrer to

the fourth. The case was thereupon tried before the court sitting without a jury, on the issues made by the allegations of the complaint and the denials contained in the answer, resulting in findings and a judgment in favor of the respondents in a sum equal to the penalty named in the bond.

The court made and filed written findings of fact, in which it found the kind and character of improvements the respondents had placed upon the premises during their occupancy; also, their value in money, holding that they were necessary improvements within the meaning of that term as used by the parties in the bond. In their appeal the appellants have not brought up the evidence, but rely for reversal on the ruling of the court striking the first three affirmative defenses, and sustaining a demurrer to the fourth, and a further error predicated on the making of the finding relating to the kind, character and value of the improvements the respondents placed upon the premises from which they were ousted.

It is first asserted that the court erred in striking the affirmative defenses wherein it was alleged that the improvements the respondents had placed on the granted premises were not necessary improvements. But we find no error in this ruling. Unquestionably it was incumbent upon the respondents, in order to recover upon the bond, to show that the improvements for the value of which they sued were necessary improvements within the meaning of the bond, but this was a burden that was upon them from the beginning; it was a necessary part of their case in chief, and the issue was properly and sufficiently made by the allegations of the complaint and the denials in the answer. The issue could in no manner be widened or otherwise changed by any affirmative allegation in the answer to the effect that improvements for which payment was claimed were not necessary improvements, and hence such an affirmative defense was properly stricken. Nor was the defense widened or changed by the further allegation that the respondents knew of the defect in the title

when they made the improvements. It was because of this defect that the bond was exacted in the first instance, and it would be contrary to the very purpose of the bond to hold that such knowledge defeated their right of recovery thereon. Had the defect been incurable and had that fact been known to the respondents, a different question would have been presented, but such was not the fact. The defect was one that could have been remedied by the appellants at any time during the life of the stipulation filed in the action pending at the time the bond was executed.

The demurrer was properly sustained to the fourth defense for the reason that the true owner of the property, and not the appellants, were entitled to recover the rents and profits during the respondents' occupancy. No claim was made under the betterment statute of 1903.

The objection to the finding relating to the improvements the respondents had placed upon the premises is based on the claim that there was no issue in the pleadings on the question therein determined. But, as we have said, this issue was made by the allegations of the complaint and the denials thereto. Whether the complaint was technically perfect is of no moment in so far as this appeal is concerned. The court's findings show that the question of the necessity of the improvements was fully met and determined. In such a case this court is obligated to treat the pleadings as sufficient.

The judgment is affirmed.

HADLEY, C. J., RUDKIN, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7635. Decided January 6, 1909.]

JOHN B. AGEN, *Respondent*, v. W. F. NELSON, *Appellant*.[1]

LANDLORD AND TENANT—LEASE—SUBLEASE—RELEASE OF TENANT. Subleases of different portions of demised premises, for less than the term of the original lease, do not constitute an assignment of the lease so as to release the lessee from liability for the rent.

SAME—SUBSTITUTION. Acceptance of rent from subtenants of different portions of the demised premises under subleases for less than the original term does not release the original tenant where receipts were given in his name, and there was nothing further to show a substitution.

SAME—UNLAWFUL DETAINER—PARTIES—POSSESSION BY SUBTENANT. Under Bal. Code, § 5527, an action of unlawful detainer for nonpayment of rent may be maintained against the original lessee where his subtenant was in possession and in default.

SAME—DAMAGES—TAXES. In an action of unlawful detainer against a tenant, and to recover rents, recovery may be had for the amount of taxes which the tenant had covenanted to pay.

Appeal from a judgment of the superior court for King county Yakey, J., entered November 27, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action for unlawful detainer by a tenant. Affirmed.

J. W. Rayburn, for appellant.

Bausman & Kelleher, for respondent.

RUDKIN, J.—On the first day of February, 1902, the plaintiff Agen leased to the defendant Nelson the west 100 feet of the south half of lot 8, in block 15, of Boren's Addition to the city of Seattle, for the term of five years, at the monthly rental of $55 per month for the first year, and $75 per month for the remaining years, payable monthly in advance. The lessee further covenanted to pay promptly and before delinquency all taxes levied or assessed against the

[1]Reported in 98 Pac. 1115.

south half of said lot 8 during the term. On the 26th day of July, 1902, Nelson leased or sublet an undivided one-half interest in the demised premises to one Sarah Slyfield, for the term of 53 months and 29 days from August 1st, 1902, subject to a prior lease of a portion of the demised premises to the defendant Love. On the 28th day of July, 1902, the remaining undivided half interest in the demised premises was sublet to one H. P. McGuire for the term of fifty-three months and twenty-seven days from the first day of August, 1902, subject likewise to the Love lease.

This action was instituted under the unlawful detainer statute against Nelson and Love, to recover possession of the demised premises for failure to pay the rents reserved for the months of August, September, October, November, and December, 1906, or surrender possession on notice and demand, and to recover taxes paid by the plaintiff, and double the amount of the unpaid rents. The court gave judgment simply for the taxes and double the amount of the rents due, the term having expired and the defendants having surrendered possession long before the trial. From this judgment the defendant Nelson has appealed.

The appellant contends that the subleases from him to Slyfield and McGuire constituted an assignment of his term, in contemplation of law, and that he was thereafter released from the obligation to pay rent. The subleases were not of the entire premises, as they were subject to the prior lease to the defendant Love, nor were they for the full term of th original lease. They did not constitute an assignment, therefore, in contemplation of law, as a part of the original term was reserved to the original lessee. *Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123; 24 Cyc. 974. Nor does it appear that the appellant was released from the obligation to pay rent by any act of the parties. Rent for the greater part of the term of the original lease was paid to the respondent by the subtenants, but receipts were at all times given in the name of the original tenant, and nothing further was

shown tending to establish a substitution of parties. We are therefore of opinion that the appellant was not discharged from the obligation to pay the rent which he assumed in his original lease, either by operation of law or by any act of his landlord. It is further contended that actions of this kind will only lie against parties in possession at the time of the commencement of the action. Conceding this to be true, it clearly appears from the testimony that Mrs. Love, a subtenant of the appellant, was in possession at the time of the commencement of the action, and under the express provisions of Bal. Code, § 5527 (P. C. § 1170), the action will lie in such cases, and the party in possession by subtenant is guilty of unlawful detainer.

It is lastly contended that the court erred in allowing a recovery for taxes paid by the respondent. The appellant covenanted to pay these taxes, and we see no reason why a recovery should not be had in this action for a breach of that covenant.

Finding no error in the record, the judgment is affirmed.

MOUNT, CROW, and DUNBAR, JJ., concur.

HADLEY, C. J., FULLERTON, and CHADWICK, JJ., took no part.

[No. 7445. Decided January 7, 1909.]

ETHEL HECTOR, *Respondent*, v. WILLIAM HECTOR, *Appellant*.[1]

APPEAL — REVIEW — FINDINGS — FORMALITY—EXCEPTIONS—NECESSITY. A decree in an equitable action which recites all the material facts, without any findings of fact having been made, has the force and effect of formal findings, which must be excepted to in order to secure a review of the evidence on appeal.

SAME. The sufficiency of findings to sustain the judgment may be challenged without any exceptions to the findings, failure to except not being ground for dismissal of the appeal.

PARENT AND CHILD—SUPPORT OF CHILDREN—AFTER DIVORCE—CONTRIBUTION. Bal. Code, § 4508, providing that expenses of the family and education of the children are chargeable upon the property of both husband and wife, raises a joint and several obligation therefor; and a divorced wife, who thereafter maintained a child awarded to her without provision for its support, is entitled only to contribution from the husband, and cannot recover from him the whole of the sums expended by her.

SAME—COSTS—ATTORNEY'S FEES. In an action by a divorced wife to recover from the husband the expense of maintaining a child and for future allowances therefor, attorney's fees are not recoverable except such as are taxable as costs under general laws.

SAME—FUTURE ALLOWANCES—CONTRIBUTION TO SUPPORT—EQUALIZATION. In an action by a divorced wife for future allowances for the support of a child awarded to her by the decree without provision for support, the court does not possess the discretion exercised in granting a divorce, but both parties must contribute equally if able, and otherwise the burden must be equalized as nearly as may be.

DIVORCE—DECREE—SUPPORT OF CHILDREN. In the decree of divorce, provision should be made for the support of the children, to the end that there may be an end to the litigation.

COSTS—ON APPEAL. In litigation between divorced parties in the interest of a child and to provide for its support, the court may direct that no costs be allowed on appeal.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered December 20, 1907, upon

[1]Reported in 99 Pac. 13.

findings in favor of the plaintiff, after a trial before the court without a jury, in an action by a divorced wife to recover the cost of support of a child. Reversed.

Samuel E. King and *Lester S. Wilson*, for appellant.

Groff & Cromwell, for respondent.

RUDKIN, J.—The plaintiff and the defendant intermarried at Walla Walla, in this state, on the 19th day of March, 1904, and remained husband and wife until the 19th day of September, 1906, at which time the plaintiff was granted a divorce from the defendant for cruel treatment on his part. After awarding the divorce, the decree recited that the plaintiff had been paid a certain sum of money in cash in lieu of her interest in the property of the defendant, and awarded to the defendant all the real and personal property in his possession and claimed by him. The plaintiff was awarded the care and custody of a minor child, then of the age of two years, and no express provision was made in the decree for its support and maintenance during its minority. The present action was commenced on the 24th day of July, 1907, to recover the sum of $500 paid out and expended by the plaintiff for the care, support and maintenance of the minor child from the date of the divorce to the date of the commencement of the action, and for a further monthly allowance of $50 per month for the care, maintenance, support and education of the child until she should attain the age of majority. The allegations of the complaint were put in issue by answer, and the cause came on for trial before the court without a jury. The court thereafter entered its decree reciting all the material facts as set forth in the complaint, viz.:

"That the plaintiff and defendant were married in the city of Walla Walla and State of Washington on or about the 10th day of March, 1904; that they were afterwards by the judgment and decree of this court in a certain action therein pending in which said plaintiff was plaintiff, and said de-

fendant was defendant, duly divorced from each other; that during their marriage a female child was born to them on the 26th day of January, 1904, as the fruit of said marriage; that by said judgment and decree of divorce said child was awarded to said plaintiff until the further order of the court; that, by said judgment and decree of divorce no allowance was made for the support and maintenance and education of said child; that said plaintiff has supported and maintained said child since the granting of said divorce and has incurred expenses in that behalf, including board, clothing, medical attendance, legal services and care and attention in the sum of four hundred and fifty dollars; that plaintiff is better fitted to have the further care and custody of said minor child than said defendant; that plaintiff is unable, from the income of her property and labor to properly support, maintain and educate said child and that defendant is possessed of real and personal property of the value of $30,000 or more, from which he derives an annual income of three thousand dollars or more, and is well able to contribute to such support, maintenance and education of said child the sum of twenty-five dollars per month; that among the lands so owned by said defendant is the east half of section twenty-seven in township ten, north of range 33, east Willamette Meridian, situate in said county of Walla Walla, State of Washington,"

and awarded judgment in favor of the plaintiff for the sum of $450 for expenses theretofore incurred in the care, maintenance and support of the child, and for the further sum of $25 per month, to be paid on the first day of each and every month until the further order of the court. From this judgment the defendant has appealed.

The respondent has moved to dismiss the appeal for the reason that no exceptions were taken to the findings of fact. In opposition to this motion the appellant contends that no findings of fact were made, but with that contention we are unable to agree. While it is true that no formal findings of fact were made, as that term is understood in law actions, yet, where a decree is entered in an equitable action finding or reciting all the material facts in the cause, such findings or

fendant was defendant, duly divorced from each other; that during their marriage a female child was born to them on the 26th day of January, 1904, as the fruit of said marriage; that by said judgment and decree of divorce said child was awarded to said plaintiff until the further order of the court; that, by said judgment and decree of divorce no allowance was made for the support and maintenance and education of said child; that said plaintiff has supported and maintained said child since the granting of said divorce and has incurred expenses in that behalf, including board, clothing, medical attendance, legal services and care and attention in the sum of four hundred and fifty dollars; that plaintiff is better fitted to have the further care and custody of said minor child than said defendant; that plaintiff is unable, from the income of her property and labor to properly support, maintain and educate said child and that defendant is possessed of real and personal property of the value of $30,000 or more, from which he derives an annual income of three thousand dollars or more, and is well able to contribute to such support, maintenance and education of said child the sum of twenty-five dollars per month; that among the lands so owned by said defendant is the east half of section twenty-seven in township ten, north of range 33, east Willamette Meridian, situate in said county of Walla Walla, State of Washington,"

and awarded judgment in favor of the plaintiff for the sum of $450 for expenses theretofore incurred in the care, maintenance and support of the child, and for the further sum of $25 per month, to be paid on the first day of each and every month until the further order of the court. From this judgment the defendant has appealed.

The respondent has moved to dismiss the appeal for the reason that no exceptions were taken to the findings of fact. In opposition to this motion the appellant contends that no findings of fact were made, but with that contention we are unable to agree. While it is true that no formal findings of fact were made, as that term is understood in law actions, yet, where a decree is entered in an equitable action finding or reciting all the material facts in the cause, such findings or

recitals have all the force and effect of formal findings in any other action and will be accepted as true by this court, unless proper exceptions are taken. *In re Clifford*, 37 Wash. 460, 79 Pac. 1001, 107 Am. St. 819; *Poor v. Cudihee*, 37 Wash. 609, 79 Pac. 1105. Inasmuch as the findings were not excepted to, we cannot inquire into the sufficiency of the testimony to sustain them, but this does not call for or necessitate a dismissal of the appeal. The appellant may still challenge the sufficiency of the findings to sustain the judgment. 1 Rem. Digest, p. 120, §148, and cases cited.

The appellant first contends that the court erred in giving judgment against him for the full amount paid out and expended by the respondent for the support of the child between the time of the entry of the decree of divorce and the time of commencement of the present action. Where a decree of divorce awards the care and custody of the children to the mother and makes no provision for their maintenance and support, there is an irreconcilable conflict in the authorities as to the right of the mother to thereafter maintain a separate action against the father to recover for necessaries furnished to the children. The cases on both sides of this question are fully reviewed in the note to *Hall v. Green*, 47 Am. St. 311 (87 Me. 122, 32 Atl. 796).

In *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 589, this court held that such an action might be maintained by the wife, but the right to recover the whole or any portion of the expenses incurred prior to the commencement of the action was not involved. In *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. 817, the court affirmed a judgment awarding to the mother one-half the sums by her expended in the maintenance and support of the minor children of the parties prior to the commencement of the action, and making a monthly allowance for future support and maintenance, but the right to recover the entire expense of such maintenance and support prior to the commencement of the action was not claimed. The court said,

however, "Clearly, the wife has every right, moral and equitable, to be reimbursed to the amount of a just proportion of the expense she has been put to in the performance of a duty which equally belongs to both." So far as we have been able to discover, all the cases holding that the mother may recover from the father the entire expense of maintaining minor children are from jurisdictions where the father is primarily liable for such maintenance, either under the common law or by statutory enactment. Thus in *Zilley v. Dunwiddie*, 98 Wis. 428, 74 N. W. 126, 67 Am. St. 820, 40 L. R. A. 579, the court said:

"At the common law, the husband was primarily liable for the support of his minor child . . . In *McGoon v. Irvin*, 1 Pin. 523, 44 Am. Dec. 409, it was said that 'by every principle of law upon the subject, recognized and strengthened by our statute, parents are under legal obligations to maintain and support their children who are of tender years and helpless.' The statute (Rev. Stats. 1878, Sec. 1503) makes the father primarily liable to support his minor children. When the marriage is dissolved by divorce, the duty of parents to maintain their children remains as before, for children are not parties to the divorce suit and do not lose any rights thereby. Hence, the father's duty to maintain them after the divorce where there is no decree of the court relating thereto, especially if their custody is not taken from him, remains as before. After the parents were divorced all duties and obligations to each other ceased: . . . Nelson, Divorce and Separation, §981. The claimant owed the husband no duty as wife and her duty to support the child continued as before, secondary, and his primary."

In *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. 542, the court said:

"The statute 43 Elizabeth, Chapter 2, directs that 'the father and mother, grandfather and grandmother, of poor impotent persons, shall maintain them, if of sufficient ability, as the quarter sessions shall direct.' Its provisions have been reenacted in several of our states; and in view of the special enactment, it has been held that where the husband and wife

are divorced, and upon her application the custody and control of their minor children are awarded to her, she cannot, in an action against the father, recover for the entire support of such children furnished by her after the divorce, but only for contribution. But there is no such statute in this state; and in general, after a divorce, as well as during coverture, the primary duty of maintaining any minor children of the marriage still remains with the former husband."

Bal. Code, § 4508 (P. C. § 3874), provides that "The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." This obligation is the same after divorce as before, unless the decree of separation provides otherwise. It follows from this that the obligation of the father and mother in this state in relation to the maintenance and support of their minor children is joint and several, and not primary and secondary as at common law. And when the mother supports and maintains the children she is but performing an obligation which the law imposes jointly upon her and the father, and we know of no principle of law that would permit her to recover the entire expense of such maintenance and support from her joint obligor. As said by the court in *Pretzinger v. Pretzinger*, and *Ditmar v. Ditmar*, *supra*, the extent of her right is an action for contribution only. It follows from what we have said that the court erred in awarding judgment against the respondent for the full amount expended in the maintenance and support of the child between the time of the divorce and the time of the commencement of the present action. We might modify the judgment in this respect without awarding a new trial, if satisfied that the record is otherwise free from error, but we are not so satisfied.

The appellant contends that attorney's fees were included in the amount of the recovery, and the findings of the court give color to this claim. Furthermore, the respondent practically concedes in her brief that such charges were in fact

included. After parties have been divorced and their property rights adjusted by a court of competent jurisdiction, in all future litigation they stand upon the same footing as any other litigants. The wife is not entitled to attorney's fees against the husband, nor is she entitled to recover any other expenses incurred in or about the litigation, except such as are properly taxable as costs under the general laws of the state. *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124; *Ditmar v. Ditmar*, *supra*.

The appellant further contends that the amount allowed for future support is excessive, but inasmuch as there were no exceptions to the findings we cannot review that question. In view of a new trial, however, we may say that the court may have committed the same error in making provision for future support as in allowing a recovery for past support; that is, the court may have ruled that the primary obligation to support the child rested upon the father. In actions of this kind, prosecuted after divorce and adjustment of property rights, the court does not possess that wide discretion which it may exercise in the divorce action. In adjusting the property rights of the parties to the divorce, the court may impose the entire obligation to support and maintain the minor children on either the father or the mother, but in a subsequent proceeding it can only enforce the obligations imposed by law. If the parties are both able to contribute to the support and maintenance of their children they must do so in equal parts. If both parties are not able, the party who has the ability must bear the entire burden as between the parents and the public. In considering the amount that should properly be allowed in such cases, the court should therefore consider the ability of the parents, the care and attention the mother must give the children, the assistance the mother will receive from the children, if any, and all the surrounding facts and circumstances, and equalize the burden between them as nearly as may be.

The practice of litigating questions of this kind by piece-

meal cannot be too strongly condemned. Here the parties settled their property rights, and in all probability the issues in the divorce action, and a decree was entered making no provisions whatever for the support or maintenance of the minor child. Almost immediately the wife begins to assert claims against the husband which should have been determined and adjusted in the divorce action. Such a practice is neither in the interest of the parties nor in the interest of society at large.

The judgment is reversed, and the cause is remanded for a new trial. On such trial the court will ascertain the sums respondent has expended in the maintenance and support of the child from the date of the divorce, excluding attorney's fees and all other expenses of litigation not properly taxable as costs, and give judgment in favor of the respondent for one-half thereof. The court will likewise fix a reasonable allowance to be made for the future support, maintenance, and education of the child on the basis we have indicated; and to avoid unnecessary costs, the testimony already taken may be considered by the court. In view of the fact that this litigation is largely in the interest of the child, no costs will be allowed on this appeal.

FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

HADLEY, C. J., and CHADWICK, J., took no part.

[No. 7654. Decided January 7, 1909.]

ROSE V. FERRANDINI, *Respondent*, v. BANKERS LIFE ASSOCIATION OF DES MOINES, IOWA, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—TRIAL OF CAUSE. Under Bal. Code, § 6535, requiring the supreme court to disregard all technicalities and determine the cause on its merits, error cannot be assigned on setting a cause for trial before the issues are made up, where the parties had full opportunity to present the merits.

PLEADING—REPLY—DEPARTURE—INSURANCE — ACTION ON POLICY. In an action upon life insurance policies where the complaint was in usual form, and the answer alleged breach of warranty and false representations as to the health of the deceased in making the application, it is not a departure in pleading for the reply to set up an estoppel to interpose those defenses by the act of its physician in examining the deceased and assuring him that he was in good health and free from disease; since it was incumbent upon the defendant to allege the breach of warranty and plaintiff need not anticipate defenses.

SAME. It is not a departure in pleading that a complaint in an action on life insurance policies alleged that the deceased applied for the insurance, and the reply alleged that the defendant solicited the insurance, as the same is immaterial.

APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS. Error in overruling a demurrer to a reply to an affirmative defense is harmless where no proof was offered to support the defense.

APPEAL—DECISION—DAMAGES FOR DELAY. In affirming a judgment, damages for delay will not be awarded where the appeal was prosecuted in apparent good faith, although there was little merit in the appeal.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered April 24, 1908, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, upon the defendant's refusing to offer any testimony at the close of plaintiff's case. Affirmed.

Voorhees & Voorhees and *Thomas C. Dutro*, for appellant.

Robertson & Rosenhaupt, for respondent.

[1]Reported in 99 Pac. 6.

RUDKIN, J.—This action was instituted to recover the sum of $6,000, on three policies of insurance for the sum of $2,000 each, issued by the defendant on the life of Antoine J. Ferrandini, and payable to the plaintiff in the event of his death. The complaint alleged, in three several causes of action, the issuance of the policies, the death of the insured while the policies were in full force and effect, the proofs of death, and the refusal of the defendant to pay the amount of the insurance. The answer admitted the issuance of the policies, and the death of the insured, denied that the policies were in force at the time of his death or at any time, and set forth the following affirmative defenses:

(1) That in his application for insurance the deceased falsely and fraudulently represented that he was in good health and free from disease; that he had had no sickness during the past five years; that he had no disease of the kidneys or urinary organs; that he had not consulted a physician for four years prior to the date of his application; that in truth and in fact at the time of making such application the deceased well knew that he was not in good health, nor free from disease; that he had consulted a physician about three months prior to the date of his application and was by him informed that he was afflicted with a disease of the kidneys and urinary organs; that said representations were falsely and fraudulently made for the purpose of obtaining the policies, and that the defendant relied on said false and fraudulent representations.

(2) That in his application for insurance the deceased warranted the statements and answers therein made to be full, complete, and true, and that any untrue answers made therein or any concealment of the truth as to his health, physical condition, or personal or family history should forfeit and cancel the policies issued pursuant to such application; that the application contained the warranties and representations set forth in the first affirmative defense; that the defendant relied on such warranties and representations, and issued the

policies in consideration thereof, and that the warranties and representations were untrue.

(3) That the application provides that the policies should not take effect unless the first payment was made, and the policies signed by the secretary and delivered during the continuance of the applicant in good health, and that at the time the first payment was made and the certificate signed and delivered the applicant was not in good health.

The reply denied the affirmative matter in the answer, and alleged:

"That by the procurement of the defendant the said deceased permitted defendant's examining physician to examine his urine, kidneys, heart and vital organs, and such examination disclosed the exact and true condition of the deceased, and the defendant constituted said physician its physician to make such examination thereof; that after full examination the said physician determined that the deceased was not in ill health; that the said deceased when he applied for life insurance subjected himself to the examination of said defendant and its examining physician and answered all of the questions truthfully and relied upon said certificate of said doctor as to the physical condition of the said deceased."

While a demurrer was pending to this reply, the case was set down for trial at a future day, over the protest of the defendant. The court overruled the protest, stating that the setting was conditional only, and that the setting would be vacated if the demurrer should thereafter be sustained. The demurrer was subsequently overruled, and the cause came on for trial before a jury. At the close of the plaintiff's case, the defendant refused to offer any testimony, and the court directed a judgment in plaintiff's favor for the full amount of the three policies. From this judgment the defendant has appealed.

While the assignments of error are fourteen in number they are all included within the following: (1) Error in setting the case for trial before the issues were made up, in contravention of the rules of the superior court of Spokane

county. (2) Error in denying the motion to strike the amended reply. (3) Error in overruling the demurrer to the amended reply. (4) Error in admitting any testimony under the pleadings. The last three assignments are based on the claim that there is a departure in the respondent's pleadings.

Bal. Code, §6535 (P. C. §1083), provides that this court must hear and determine causes on their merits, disregarding all technicalities, and under this section we cannot consider a mere error or irregularity in setting a case for trial before the issues are made up, where the parties have been given a full opportunity to present their cause of action or defense. If the action of the trial court in setting the cause for trial was erroneous, it was clearly error without prejudice so far as this record discloses.

In support of its contention that there was a departure in the pleadings, the appellant says:

"The amended reply, briefly stated and in substance, seems to be that the conclusion of the medical examiner that the insured was in good health, estops the association from questioning the representations of the assured, contained in the contracts, but in the contracts themselves nothing can be found to sustain this proposition, so that the amended reply, in effect, denies the contracts declared upon in the complaint, and sets up entirely different contracts, and a departure in the pleadings is apparent."

There is no merit in this contention. The pleadings are in the usual form in actions of this kind. The respondent set forth her cause of action under the policies; the appellant sought to defeat the policies by alleging breach of warranty and false representations, and the respondent replied that the appellant was estopped to interpose these defenses. This did not change the contract of insurance or the cause of action. Bal. Code, §4917 (P. C. §384), provides, that,

"When the answer contains new matter constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation con-

troverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter, not inconsistent with the complaint, constituting a defense to such new matter in the answer."

We think the reply in question was fully warranted by this section. A departure takes place "When in any pleading, the party deserts the ground he took in his last antecedent pleading, and resorts to another." Stephens, Pleadings, 410. In actions of this kind it is incumbent on the defendant to allege and prove the breach of any warranties contained in the application or policy, and the plaintiff is not bound to anticipate the defense his adversary may make. If the contention of the appellant is sound, a plaintiff must amend his complaint and anticipate a defense every time he seeks to estop a defendant from claiming a forfeiture or breach of warranty in the contract on which the action is brought. Such a rule cannot obtain. In *Commercial Electric Light & Power Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592, the plaintiff's right of action was based on a franchise granted by the city of Tacoma which possessed all the essential elements of a contract. The answer alleged a forfeiture of the franchise or contract and the reply pleaded an estoppel. The claim was advanced there, as here, that the reply should have been stricken, but the court said:

"Appellants also complain of the court's refusal to strike plaintiff's reply on the alleged ground that it was immaterial and irrelevant. The answer filed by defendants set up facts going to show that the plaintiff had forfeited whatever rights it obtained by virtue of the city ordinance, and the plaintiff in its reply stated affirmative matters showing a waiver or estoppel on the part of the city. We think that this matter in the reply was not inconsistent with the complaint, but on the contrary was in accordance with that section of the Code of Procedure which provides that any new matter, not inconsistent with the complaint, constituting a defense to new matter set forth in the answer may be alleged in the reply."

See, also, *Craven v. Gillilan*, 73 Mo. 524; 6 Ency. Plead. & Prac. 465 *et seq.* The fact that the reply alleged that the deceased was examined for insurance by the procurement of the appellant, while the complaint alleged that the deceased applied for the insurance, is utterly immaterial. The cause of action and the contract remained the same whether the deceased applied for the insurance or the appellant or its agents solicited the insurance.

It is further claimed that the plea of estoppel contained in the reply was insufficient in law, but that question is not material now. No testimony was offered either in support of the reply or in support of the affirmative defenses against which the reply was directed, and the judgment does not depend for support on anything contained in the reply. The overruling of a demurrer to an affirmative answer or reply is error without prejudice where no proof is offered in support of the affirmative pleading. *Hill v. Young*, 7 Wash. 33, 34 Pac. 144; *Campbell v. Bear River & Auburn etc. Mining Co.*, 35 Cal. 679; *Adams v. Harold*, 29 Ind. 198; *Nave v. Wilson*, 33 Ind. 294.

The respondent contends that this appeal is prosecuted for delay only, and that this court should impose fifteen per cent damages on affirmance, under Bal. Code, § 6522 (P. C. § 1070). We have always refused to award damages under this section where an appeal is prosecuted in apparent good faith, though there may be little merit in the appeal itself. The claim for damages is therefore disallowed, but the judgment is affirmed.

FULLERTON, MOUNT, and DUNBAR, JJ., concur.

[No. 7680. Decided January 7, 1909.]

C. J. JENSEN, *Respondent*, v. SPOKANE FALLS & NORTHERN RAILWAY COMPANY, *Appellant*.[1]

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SURPRISE — DILIGENCE. In an action for goods lost in transit, it is error to grant plaintiff a new trial for newly discovered evidence and surprise, in that two witnesses for defendant testified that a release of liability was signed in their presence by defendant's wife, while an agent of the defendant had admitted to plaintiff's counsel before the trial that there was a dissimilarity in the signatures, leading counsel to expect that such defense would be abandoned, where it appears that such release was set up as a defense, a bill of particulars was furnished in answer to a demand as to when and in whose presence the release was signed, and the wife's signature and authority were admitted in the reply, and the matter was fully gone into on the taking of depositions, and no suggestion of surprise was made at the trial or until after an adverse decision in the cause.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered February 15, 1908, granting plaintiff's motion for a new trial, after a trial before the court without a jury. Reversed.

M. J. Gordon and *A. J. Laughon*, for appellant.

John L. Dirks, for respondent.

RUDKIN, J.—This action was instituted against the Spokane Falls & Northern Railway Company and the Great Northern Railway Company, to recover the value of certain household goods shipped over the line of the former company from the Little Dalles to Spokane, and lost in transit. Among other defenses interposed, the separate answer of the Spokane Falls & Northern Railway Company alleged that, in express consideration of the freight rate for which it agreed to transport the goods, and as a condition upon which the goods were to be transported for such rate, the

[1]Reported in 98 Pac. 1124.

plaintiff signed a special contract which is set forth in the answer, by the terms of which the liability of the railway company for the loss of the goods was limited to $5 per hundred-weight. By his reply the plaintiff expressly admitted the signing of this shipping receipt or bill of lading. The case was tried before the court without a jury, and at the conclusion of the trial the court found the facts as alleged in the separate answer, found that the plaintiff had signed the limited liability contract, and ordered judgment in favor of the plaintiff and against the Spokane Falls & Northern Railway Company for the sum of $11.25, being at the rate of $5 per hundred-weight for the goods lost. The action was dismissed as to the Great Northern Railway Company. A motion for new trial was thereafter interposed by the plaintiff on the ground of newly discovered evidence, and accident and surprise which ordinary prudence could not have guarded against. The motion was granted as to the Spokane Falls & Northern Railway Company, solely on the ground of accident and surprise; and from the order granting the new trial, that company has appealed.

At the trial of the action two witnesses for the appellant testified that the wife of the respondent signed the special contract or shipping receipt set forth in the answer, in their presence, at Northport, Washington, and the respondent admitted that his wife had authority to sign the contract in his behalf, if she did so. The accident and surprise for which the new trial was granted arose out of the following facts. The respondent made affidavit that, on or about May 12, 1907, the city agent of the Great Northern Railway Company at Butte, Montana, exhibited to him and his attorney a carbon copy of the contract set forth in the answer, that the respondent and his attorney and the Great Northern agent compared the signature *C. J. Jensen* appearing on the carbon copy with signatures written by the respondent's wife, as the same appeared in certain letters written by her before the present controversy arose; that the Great Northern agent

admitted that there was no similarity between the signature affixed to the carbon copy and the signature appended to the letters exhibited to him; that, in view of the admissions made by this agent, the respondent did not understand or believe that an attempt would be made to prove that his wife signed his name to the special contract, and that, if he had so understood or believed, he could have produced a large number of letters written by his wife which would show that it was a physical impossibility for her to write or sign his name in the style, manner or appearance that the same appeared in the written contract.

It will thus be seen that the respondent was surprised solely because of his reliance on certain statements or admissions made by an agent of the Great Northern Railway Company at Butte, Montana. But, aside from the fact that this agent had no authority to bind either this appellant or his own company by any such statements or admissions, and the further fact that the respondent had no right to rely upon them, it clearly appears that the respondent's attorneys were neither surprised nor misled, and it is a significant fact that the Montana attorney, who was present at the time the admissions were made and who afterward examined the respondent and his wife at the time their depositions were taken, makes no such claim in his affidavit filed in support of the motion. The record before us affords abundant evidence that the respondent's attorneys were at all times fully aware that this special contract was a vital issue in the case. The appellant's answer setting forth a copy of the contract was filed on January 23, 1907. On January 30, 1907, the respondent demanded a bill of particulars stating at what station the special contract was signed, on what date, and in whose presence. On February 2, 1907, the bill of particulars was furnished, stating that the contract was signed at Northport, Washington, on the 18th day of August, 1905, in the presence of the Company's cashier, W. C. Stevens, and others whose names the appellant was unable to recall. On

February 13, 1907, a reply was filed by the respondent formally admitting the signing of the bill of lading as set forth in the answer, and that reply has never been changed or amended so far as the record discloses. When the depositions of the respondent and his wife were taken in Montana, two days after this conversation with the Great Northern agent at Butte, the question of the signing of this contract by the respondent's wife was fully gone into on both direct and cross-examination; and when the respondent's attorney stated, in the course of taking the depositions, that he and the Great Northern agent had compared the signature appearing on the carbon copy of the contract with other signatures of Mrs. Jensen and concluded that the signature on the carbon copy was not the signature of Mrs. Jensen, counsel for appellant promptly objected to the statement on the ground that the same was incompetent, irrelevant and immaterial. No suggestion of accident or surprise was made to the court at any time during the trial, nor until after the adverse decision was announced.

It seems to us that a bare inspection of this record should convince one, without argument or citation of authority, that the claim of surprise, as that term is understood in the law, is wholly unfounded, and that the new trial was improvidently granted. Before a new trial can be granted on the ground of surprise, it is indispensable that the applicant should show: (1) That he was surprised in fact; (2) that ordinary prudence on his part would not have guarded against it; and (3) that the claim of surprise was promptly made known to the trial court and a continuance asked for. In our opinion the showing made in this case is lacking in all three of these essentials. *Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740; *Pincus v. Puget Sound Brewing Co.*, 18 Wash. 108, 50 Pac. 930; *State v. Power*, 24 Wash. 34, 63 Pac. 1112; *Reeder v. Traders' Nat. Bank*, 28 Wash. 139, 68 Pac. 461; *State v. Vance*, 29 Wash. 435, 70 Pac. 34; *Clemans v. Western*, 39 Wash. 290, 81 Pac. 824; *Dumontier*

v. Stetson & Post Mill Co., 39 Wash. 264, 81 Pac. 693; *Woods v. Globe Navigation Co.*, 40 Wash. 376, 82 Pac. 401.

When a case has been once finally tried and a decision rendered, the state, as well as the successful litigant, has an interest in the result, and a retrial should not be granted on any such showing as appears in this record.

The order granting the new trial is reversed, with directions to enter judgment on the findings of fact and conclusions of law.

HADLEY, C. J., FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7452. Decided January 7, 1909.]

JOHN E. CARNEY *et al.*, *Respondents*, v. FRANK L. BIGHAM *et al.*, *Appellants*.[1]

TAXATION — FORECLOSURE — SUMMONS BY PUBLICATION — NAME OF OWNER. Under Laws, 1901, p. 383, § 1, providing that the holder of a tax delinquency may give notice to the "owner of the property described in the certificate," and Id., § 3, providing that the names of the persons appearing on the assessment rolls as the owners of said property shall be considered the owners thereof, notice of foreclosure must be given to the actual owner or the owner described on the rolls, and not to the person erroneously named in the certificate of delinquency as the owner; hence where the property of John E. Carney was assessed on the rolls to J. E. Carney, and the certificate named J. G. Carney, the summons by publication was issued in the latter name, and the owner was misled and had no actual notice of the suit, the tax foreclosure and deed is void.

SAME—NAMES—MIDDLE INITIAL. A tax foreclosure of the property of John E. Carney, on publication of a summons against John G. Carney, cannot be sustained on the theory that the middle initial is no part of a person's name.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 8, 1908, in favor of the plaintiffs, upon stipulated facts, in an action of ejectment. Affirmed.

[1]Reported in 99 Pac. 21.

Walter S. Fulton, for appellants.

Willett & Willett, for respondents.

FULLERTON, J.—The respondents, who were plaintiffs below, brought this action to recover possession and quiet title to certain real property, situated in the city of Seattle, of which the appellants had possession, and which they were claiming under a tax deed issued by King county, in a tax foreclosure proceeding.

The facts were stipulated by the parties, and were in substance these: On and prior to June 3, 1901, the respondents were the owners in fee of the property in question, the title standing of record in the name of the husband, John E. Carney. The land had been listed for taxation on the assessment rolls of King county for the years 1896 to 1901, inclusive, under the name of J. E. Carney, and the taxes thereon for the several years named were unpaid. On August 2, 1900, the county treasurer of King county issued to the appellant Frank L. Bigham a certificate of delinquency in the sum of $4.49 for the year 1896, whereupon Bigham paid the taxes for the subsequent years of 1897, 1898, and 1899. The certificate recited the name of the person to whom the property was assessed as J. G. Carney, instead of J. E. Carney, as it appeared on the assessment rolls. After purchasing the certificate, the appellant Bigham inquired, in the neighborhood of the lots, for the J. G. Carney named in the certificate as the owner of the property, but failed to find any such person, although the real owner John E. Carney then resided, and for ten years or more had resided, within three blocks of the property; he being a well-known contractor and builder of the city of Seattle, having his name and address in the current city directories, both individually and in connection with the contracting firm of which he was a member.

June 3, 1901, the appellant Bigham, as plaintiff, began an action to foreclose the certificate of delinquency, making parties defendant J. G. Carney and Jane Doe Carney, his

wife. Summons for personal service was issued and placed in the hands of the sheriff of King county, who returned the same not found. Summons was thereupon served by publication, and in due time a judgment of foreclosure was entered and a sale had thereon, under which the tax deed was issued which is sought to be cancelled in the action. It is further agreed that the taxes paid by the appellants, together with interest, penalties and costs, amount to the sum of $65. On the foregoing facts, the court held the foreclosure invalid, and entered a judgment cancelling the tax deed and quieting title in the respondents, giving the appellants judgment for the sum of $65, the amount of taxes paid by them.

It will be observed from the foregoing statement that neither the true owner of property, nor the person whose name appeared on the assessment rolls as the owner of the property, was made a party defendant to the foreclosure proceeding; but that the county treasurer, through inadvertence or otherwise, inserted a fictitious name in the certificate of delinquency which he issued to the appellant Frank L. Bigham, and that the appellant, being misled thereby, foreclosed against this fictitious person. The appellants contend, nevertheless, that the foreclosure proceeding is valid; that it is sufficient by the express terms of the statute to make the person named in the certificate of delinquency the sole party defendant, and that this court has so held. The statute relied upon is §1 of the act of March 20, 1901. Laws 1901, p. 383. By that act it is provided that, at any time after the expiration of three years from the original date of delinquency of any tax included in a certificate of delinquency,

"The holder of any certificate of delinquency may give notice to the owner of the property described in such certificate that he will apply to the superior court of the county in which the property is situated for a judgment foreclosing the lien," etc.

It is insisted that the word "described" in the quoted portion of the statute modifies the word "owner," instead of the

word "property," and hence the true construction of the statute is that the person named in the certificate of delinquency shall be deemed the true owner for the purpose of foreclosing the tax lien. The proper interpretation of this clause of the statute might be doubtful, if it stood alone, but a subsequent section definitely fixes its meaning. By §3 of the act above cited, it is provided that,

"The names of the person or persons appearing on the treasurer's rolls as the owner or owners of said property for the purpose of this act shall be considered and treated as the owner or owners of said property."

This section makes is clear that the person to whom the property is assessed is the only person other than the true owner against whom a valid foreclosure proceeding may be had in the courts, and that the insertion by the treasurer of the name of a person different from that appearing on the assessment rolls as the owner does not authorize the holder of the certificate to foreclose the lien by making such person a party defendant unless he be the true owner. On the contrary, the holder must at his peril foreclose against the person named on the treasurer's rolls as the owner of the property, or he must foreclose against the true owner.

The cases relied on to support the contention of the appellant are, *Anderson v. Turati*, 39 Wash. 155, 81 Pac. 557, and *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599. In the first of these cases it was said that the name of the owner described in the tax rolls and certificate of delinquency should be included in the summons, and that it is defective without it. In the second case similar language was used, and the further statement made that the statute only requires notice to be given to the owner described in the certificate. But an examination of the opinions in their entirety will show that the court used these expressions on the supposition that the treasurer had complied with his duty and had inserted in the certificate of delinquency the name of the person to whom the property was assessed on the treasurer's rolls. They

were not made with the view of a mistake on the part of the treasurer. Moreover the real meaning of the court was made clear in the subsequent case of *Sherman v. Schomber*, 43 Wash. 330, 86 Pac. 569, where the statute last above cited was quoted and this language used:

"This provision [Sec. 3 of the act of March 20, 1901] is clear and explicit to the effect that the person appearing as the owner on the treasurer's rolls shall be considered and treated as the owner,"

for the purpose of foreclosure; saying further that the appellants' contention to the effect that the statute quoted applied to foreclosures by the county, and not to foreclosures by an individual was unfounded, as the provision clearly applies to both classes.

Nor can the foreclosure proceedings be upheld on the theory that the middle initial is no part of a person's name, and hence no part of the name inscribed upon the assessment roll or in the certificate of delinquency. At common law, it is true, a legal name consisted of one given name and one surname or family name, and mistakes in a middle initial or a middle name were not regarded as of consequence. But since the use of initials instead of a given name before a surname has become a common practice, the necessity that these initials be all given and correctly given in court proceedings has become of importance in every case and in many absolutely essential to a correct designation of the person intended. The present case is a good illustration of the latter class of cases. The respondent, as has been shown, was a well-known person living close to the property in question, having his name in two places in all of the current city directories, yet neither the purchaser of the tax certificate when inquiring for the owner of the property, nor the sheriff having the process in his hand for service thought it worth while to inquire of the respondent whether he was the owner of the property or the person intended to be named in the

certificate of delinquency. Had the middle initial been correctly given no such oversight could have been possible.

The judgment appealed from is right and will stand affirmed.

MOUNT, RUDKIN, and DUNBAR, JJ., concur.

[No. 7306. Decided January 11, 1909.]

WILL A. CHILDS, *Appellant*, v. MINNIE GOOD SMITH *et al.*, *Respondents.*[1]

MORTGAGES—FORECLOSURE—LIMITATION OF ACTIONS — ESTOPPEL TO ASSERT — RENEWAL NOTES — CONSTRUCTION OF PROVISION FOR. A mortgagor is not estopped to set up the defense of the statute of limitations by a clause in a mortgage providing that if the debt is not paid at maturity the same may be renewed and said renewal note and interest shall be secured by the mortgage and continue a lien upon the premises until the debt and all renewals shall be fully paid; and the mortgage and note are barred by the lapse of six years after the last renewal.

TAXATION—RIGHTS OF MORTGAGEE—EQUITABLE LIEN—PAYMENT OF TAXES. A mortgagee whose mortgage is outlawed has an equitable lien for taxes and special assessments paid by him in good faith under the belief that his mortgage was valid; and the same is not a voluntary payment when made for the purpose of protecting the mortgage lien.

SAME—LIMITATION OF ACTIONS — LIEN FOR TAXES — SUBROGATION. The equitable lien of a mortgagee for general taxes paid in good faith is not barred by the statute of limitations, since the statute could not be set up against the county or state, to whose rights the mortgagee is subrogated; the statute providing that taxes are a lien until paid.

SAME—LIEN FOR SPECIAL ASSESSMENTS—MUNICIPAL CORPORATIONS. The equitable lien of a mortgagee for the amount of special assessments paid in good faith is barred by the lapse of ten years after the date of delinquency of the assessments; since the rights of the city to enforce the assessments are barred at that time, and the mortgagee is simply subrogated thereto.

[1]Reported in 99 Pac. 304.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered November 12, 1907, in favor of defendants upon an agreed statement of facts, dismissing an action for the foreclosure of a mortgage. Reversed.

John L. Wiley, for appellant.

Merritt, Oswald & Merritt, for respondents.

CROW, J.—This action was commenced on April 16, 1907, by Will A. Childs, against Minnie Good Smith and J. Carter Smith, her husband, to foreclose a mortgage on lot 12, block 1, of Chandler's Addition to the city of Spokane. The plaintiff alleged, that on June 27, 1890, the defendants executed and delivered to the Northwestern Guaranty Loan Company, a corporation, their note for $350, payable December 27, 1890, secured by their mortgage on the real estate above mentioned, the same being the mortgage sought to be foreclosed in this action; that on December 8, 1892, they executed and delivered to the Northwestern Guaranty Company a renewal note for the same debt, payable June 27, 1893; that no payments of either principal or interest have been made thereon; that by mesne conveyances the plaintiff, on October 7, 1893, became the owner and holder of the renewal note and mortgage; that the defendants neglected to pay taxes and special assessments which had become valid liens on the real estate; that plaintiff paid such general taxes for all years from 1893 to 1903, inclusive, except for the years 1898 and 1899; that on January 14, 1904, he also paid $155.03 to the city of Spokane on delinquent street assessments, and that for such taxes and assessments he holds an equitable lien. The defendants alleged that the cause of action in the complaint stated did not accrue within six years prior to the commencement of this suit, and that it is barred by the statute of limitations. The trial court held with the defendants on this issue, and entered a final judgment in their favor, dismissing the action. The plaintiff has appealed.

There is no dispute as to the facts. The mortgage contained a stipulation reading as follows:

"It is further expressly agreed and understood by and between the parties hereto that in the event said promissory note is not paid at the maturity thereof, together with the interest due thereon, or any part thereof, the same may be renewed at the option of the said party of the second part, and said renewal note and interest shall be secured by this mortgage, and the same shall continue a lien upon said premises until the debt hereby secured and any and all renewals thereof, shall be fully paid and satisfied."

The appellant contends that he has at all times relied upon this stipulation as a waiver of any defense under the statute of limitations, and as preserving to him a continuing lien upon the premises; that he has therefore refrained from bringing suit by foreclosure or otherwise within the statutory period and that the respondents should be estopped by the express terms of their contract from pleading the bar of the statute. The appellant falls into error in his interpretation of the clause above quoted. It simply accorded to him the right to demand and obtain renewal notes. This he failed to do, after one renewal had been made, and at all times after he purchased the note and mortgage. His mortgage lien and note are therefore barred, being more than six years past due. The trial court properly sustained the plea of the statute of limitations to the note and mortgage.

The appellant further contends that the trial court erred in refusing him an equitable lien for the taxes and assessments which he has paid. This contention should be sustained. Believing he held a valid mortgage lien not barred by the statute of limitations, the appellant in good faith paid the delinquent taxes and assessments for the purpose of protecting such lien. These payments were not voluntarily made. In *Wheeler Co. v. Pates*, 43 Wash. 247, 86 Pac. 625, the holder of a void tax deed, claiming title, paid taxes on the land subsequent to the tax foreclosure and sale His deed was afterwards adjudged to be invalid, but this court recog-

nized his right to an equitable lien for the subsequent taxes so paid by him, saying:

"Respondent's right of recovery is not based upon any statute, but it is upon purely equitable grounds arising from the fact that the payments made have inured to the benefit of appellants and have accomplished for them the discharge of a duty with respect to the land which they, as the real owners, were under obligations to discharge themselves."

In *Hemen v. Rinehart*, 45 Wash. 1, 87 Pac. 953, the plaintiff commenced an action to quiet his title to certain real estate as against a pretended judgment lien asserted by the defendants. In their answer the defendants pleaded facts upon which they relied to sustain the validity of their judgment lien, and also pleaded their payment of certain delinquent taxes to protect the same. Their judgment had become dormant, and it was held that they were entitled to no lien thereunder; but in passing upon their claim to a lien for the taxes this court said:

"The first affirmative defense does, however, allege the payment of $231.20 of general taxes by the appellants, which they made for the purpose of protecting their asserted lien. These payments were not voluntary, but were made in good faith. The judgment was an actual lien for the period of five years after its rendition, and the appellants have in good faith, although erroneously, believed and insisted that they have continued to hold a lien until the present time. Under the previous decisions of this court, they are entitled to an equitable lien on the land for the total amount of taxes paid by them, with interest from the several dates of payment."

See, also, *Spokane v. Security Sav. Society*, 46 Wash. 150, 89 Pac. 466.

The payment of the general taxes by the appellant Childs has prevented the respondents' property from being sold for delinquent taxes. It nowhere appears that they at any time paid or offered to pay the taxes for which a lien is now claimed by the appellant. Appellant did not make a volun-

tary payment, nor did he intend to protect the title for the benefit of the respondents. Although mistaken, he honestly believed he held a valid mortgage lien, not barred by the statute of limitations, and made the payments for the sole purpose of protecting such supposed lien. Under these circumstances, he is entitled to an equitable lien on the land to secure the taxes so paid by him under a misapprehension, and is also entitled to interest thereon from the respective dates of payment at the rate of six per cent per annum. The respondents are in no position to plead the statute of limitations as against these general taxes, or the appellant's equitable lien therefor. When appellant made the payments he was equitably subrogated to the rights and liens held by the county and state. Respondents did not make the payments, and they could not successfully interpose a plea of the statute of limitations against the state or county, if they still held the tax liens and were seeking to enforce the same. *Port Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045; *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751.

Bal. Code, § 1740 (P. C. § 8678) provides that taxes assessed upon real estate shall, after levy, be a lien thereon until paid. Had no payment of these general taxes been made by the appellant, and had there been no tax foreclosure, the lien would still exist in favor of the county and state, and respondents' property would still be subject thereto. It would be inequitable and a manifest injustice to permit the respondents to now secure a release of their property from the lien held by the appellant by a plea of the statute of limitations. To avoid such a miscarriage of justice the appellant should be equitably subrogated to all the rights and liens of the county and state.

What we have said in regard to the general taxes applies to the special assessments, except that appellant's equitable lien therefor might be barred by the statute pertaining to such assessments. The record fails to show when they became delinquent. Under the act of 1895 (Bal. Code, § 1150;

P. C. § 3637), an action by the city to enforce its lien would be barred in ten years after delinquency. If at the time of the commencement of this action more than ten years had elapsed since the original delinquency to the city on the special assessments afterwards paid by appellant, his equitable lien therefor would be barred; otherwise not. Although he is entitled to be subrogated to the rights of the city, he cannot hold a lien for any longer time than the city itself could have successfully asserted the same. While on equitable principles he succeeds to the rights and lien of the city, it is manifest that he can acquire nothing more. The pleadings set forth all the facts necessary to show the appellant's equitable lien for the taxes and assessments. The parties are all before the court, and their rights should be finally determined in this action.

The judgment is reversed, and the cause remanded with instructions to the trial court to ascertain the amount of the general taxes, and also assessments not barred, with six per cent interest thereon from the respective dates of payment, to decree the appellant an equitable lien on the land therefor, to enter a judgment foreclosing the same, and to award him an order of sale to enforce payment. The appellant will recover costs in this court.

FULLERTON, MOUNT, and RUDKIN, JJ., concur.

[No. 7554. Decided January 11, 1909.]

NELS ANDERSON, *as Administrator, etc., Appellant*, v. ROBERT SHIELDS, *Respondent*.[1]

JUDGMENT—VACATION OF VOLUNTARY DISMISSAL—EXCUSABLE NEGLECT — DISCRETION OF COURT — CONTINUANCE — ABSENCE OF COUNSEL. The denial of the vacation of a judgment of voluntary dismissal, asked for on the ground of mistake, inadvertence and excusable neglect, is largely a matter of discretion; and no abuse of discretion is shown where it appears that the case was set for hearing on 10 a. m., that one of the plaintiff's counsel was present and asked for a continuance until the afternoon in order that other counsel familiar with the case could attend, but refused to consent to pay witness fees of one witness amounting to $2.50 a day as a condition for the continuance, and rather than do so, asked a dismissal of the suit without prejudice, which was granted, there being no showing that counsel were misled; although by such dismissal the operation of the statute of limitations barred a recovery; since the neglect of counsel to know that the statute would run does not fall within the provisions of the statute, and counsel must take notice of the probability that cases will be called at the time they are assigned.

Appeal from an order of the superior court for Whatcom county, Neterer, J., entered April 6, 1908, refusing to vacate a judgment of dismissal, after a hearing upon affidavits. Affirmed.

Million & Houser (*Parrott & Griswold*, of counsel), for appellant.

Crites & Romaine, for respondent.

DUNBAR, J.—This is an appeal from an order refusing to vacate a judgment of voluntary nonsuit and reinstate the case for trial. The facts are about as follows: The action was brought to recover $258, being the balance due upon a note given for $458, upon which a payment of $200 was made on November 1, 1901. The answer alleged the payment in full of the note. The case was set down for trial on Monday,

[1]Reported in 99 Pac. 24.

April 6, 1908. The attorneys for the plaintiff were Million & Houser, of Seattle, and Parrott & Griswold, local counsel. The affidavit for continuance shows that the plaintiff's case was in charge of E. C. Million, one of the attorneys, that he was familiar with the evidence in the case, and that Griswold was not. After the case was set for trial, Million was informed by Griswold that the trial would probably not be reached until Monday afternoon or Tuesday morning. The record shows that, when the case was called at 10 a. m., Monday, April 6, 1908, the plaintiff appeared by W. J. Griswold, Esq., of the law firm of Parrott & Griswold, and the defendant appeared in court in person and by his attorneys, Crites & Romaine, whereupon the following proceedings were had:

"The Court: Are both parties ready for trial in this case? Mr. Romaine: If your honor please, we are prepared to go to trial. Mr. Griswold: If your honor please, we cannot go to trial at this time, for the reason that Mr. E. C. Million, one of the attorneys for the plaintiff, has the note in his possession and all the evidence which plaintiff will be required to introduce to substantiate his claim. As he has not shown up, I would ask for a few minutes' time in which to telephone and locate him. The Court: Very well, you may have a few minutes."

After the lapse of a short time, Mr. Griswold returned and informed the court that Mr. Million could not arrive before one o'clock, and that he did not feel authorized to commence the trial of the case. Mr. Romaine objected to any continuance, stating that they were keeping a witness at an expense of $2.50 per day; that the witness resided at Fraser river and was anxious to get home and begin work, and he should object to a continuance unless plaintiff would pay the witness $2.50 per diem and board until the case was tried. Mr. Griswold stated that he did not feel authorized to make any such arrangement, and in view of the court's ruling that unless a continuance was consented to the cause must proceed to trial, moved the court to dismiss the case without

prejudice at plaintiff's cost. The motion was granted. At 6:30 p. m. of the same day, plaintiff appeared by E. C. Million and made a motion to vacate the judgment of dismissal, setting up the fact that he had been attending to some business in Mount Vernon the night before, and that he had not left that place until noon for Bellingham, arriving there after the case had been dismissed. The motion to vacate was opposed by the attorney for the defense. Mr. Griswold also filed an affidavit in support of the motion, the substance of which was that he had notified Mr. Million that the case was set for trial on Monday morning, but that it would probably not be tried before the afternoon, or the morning of the next day. Upon this showing, the court refused to vacate the judgment, and this appeal is taken.

Of course, it is conceded that a question of this kind is very largely a matter within the discretion of the court, and that the appellate court will not disturb the judgment of the lower court unless that discretion has been plainly abused. We do not think it can be said that there was such an abuse of discretion in the case at bar as would warrant the interference of this court. It appears from the record that the anxiety of counsel for the appellant to have the case vacated, instead of bringing another action, was because of the fact that, if the dismissal of the cause stands, the statute of limitations intervenes, and the action is barred. Bal. Code, § 4953 (P. C. §424), provides that the court may, upon such terms as may be just and upon the payment of costs, relieve a party from an order taken against him through his mistake, inadvertence, surprise, or excusable neglect. The neglect of the appellant in this case to know that the statute of limitations would run against his claim in case his action was dismissed, we do not think falls within the provisions of this statute. Nor is this a case where the case was wrongfully dismissed. It was within the power of the appellant to accede to the demands of the respondent in relation to paying the expenses of the witness whom he was holding there, and

it was certainly a very modest demand. This counsel did not see fit to do, but chose the alternative of asking to have the cause dismissed, and after the action of the court in complying with his request, we do not think he can be heard to say that he did not, as a legal proposition, understand the full scope and effect of the decision for which he asked. While the main consideration always is the trial of the case on the merits, yet statutes and rules of practice are enacted for a good purpose, and they must be taken notice of by litigants. There seems to have been no justification for the notice, given to attorney Million by attorney Griswold, that the case would probably not be tried before the afternoon or morning of the next day. It does not appear in the record, but it is stated by counsel for respondent, that this was the only cause on the docket for Monday. We mention this statement outside of the record merely to show that such a state of facts is probable when a case is assigned, and that counsel must take notice of the probability that their cases will be called at the time they are assigned for hearing. In view of the fact that the motion was made by appellant's counsel, and that there was no showing that counsel had been misled in any way, and his own statement being to the effect that he knew that the assignment had been made for ten o'clock on Monday, we think we should not be justified in interfering with the discretion of the court, and that this case falls within the principle of the rule announced in *Myers v. Lundrum*, 4 Wash. 762, 31 Pac. 33, and *Sanborn, Vail & Co. v. Centralia Furniture Mfg. Co.*, 5 Wash. 150, 31 Pac. 466.

The judgment is affirmed.

MOUNT, CROW, and RUDKIN, JJ., concur.

[No. 7524. Decided January 16, 1909.]

LIZZIE C. BAKER, *Respondent*, v. HERBERT E. ROBBINS *et al.*, *Appellants*.[1]

SALES—RESCISSION BY VENDEE—BREACH OF WARRANTY. The rule that an executed contract of sale cannot be rescinded for breach of warranty does not obtain where the warranty was fraudulently and deceitfully made.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS BELOW. The objection that there can be no rescission of a contract for breach of warranty cannot be raised for the first time in the supreme court, nor where an instruction to that effect was not excepted to in the court below.

TENDER — EVIDENCE — QUESTION FOR JURY. The sufficiency of a tender is for the jury, where there was evidence of an informal tender from which the jury might well conclude that a more formal tender would be vain and useless.

SALES—RESCISSION BY VENDEE—FRAUD—WAIVER. The purchaser of a horse does not waive his right to rescind the sale for fraud by use of the horse after attempted rescission, where such use was merely to give necessary exercise and keep the horse in condition.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered January 4, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Cooley & Horan, for appellants.

Hulbert & Husted, for respondent.

RUDKIN, C. J.—This action was instituted to recover the purchase price of a horse, after a rescission of the contract of sale for breach of warranty. From a judgment in favor of the plaintiff, the defendants have appealed.

But two errors are assigned; viz., error in overruling a motion for nonsuit, and error in overruling a motion for new trial. Under these assignments the appellants contend: (1)

[1]Reported in 99 Pac. 1.

That an executed contract of sale cannot be rescinded, in the absence of fraud, for a mere breach of warranty; (2) that no sufficient tender was made to effect a rescission; and, (3) that the right of rescission was waived by the conduct of the respondent and her husband. The weight of authority seems to sustain the first contention made by the appellants, but we do not think the rule should obtain in this case for two reasons. First, because the complaint alleged that the warranty was fraudulently and deceitfully made; and second, because the question of the right to rescind for a mere breach of warranty was not raised in the court below. Where the representation or warranty is fraudulently made the authorities all agree that the contract of sale may be rescinded, and a fraudulent warranty was alleged in this case. If the jury were justified in finding that a warranty was given, we think they were equally justified in finding that it was made with full knowledge of its falsity. Again, the only objections urged in support of the nonsuit were insufficiency of the tender and the question of waiver. The court instructed the jury that the contract of sale might be rescinded for a mere breach of warranty, and this instruction was not excepted to. We are therefore of opinion that the first contention is untenable.

We also agree with the trial court that the question of the sufficiency of the tender and the question of waiver were for the jury. While the tender testified to by the respondent was somewhat informal, yet we think the jury might well conclude that a further or more formal tender would be vain and useless in view of the acts and conduct of the appellants.

The claim of waiver was based upon the fact that the respondent and his wife had used the horse after the attempted rescission of the contract of sale. There was testimony tending to show that such use was not as owner, but merely to give the horse necessary exercise and keep him in proper condition, and such use would not, as a matter of law, constitute a waiver of the right to rescind. All questions of fact in the

case were submitted to the jury under proper instructions, which were not excepted to, and their verdict is conclusive upon this court.

The judgment is therefore affirmed.

FULLERTON, CROW, and MOUNT, JJ., concur.

[No. 7552. Decided January 16, 1909.]

OTTO BITTRICK *et al.*, *Respondents*, v. CONSOLIDATED IMPROVEMENT COMPANY, *Appellant*.[1]

SPECIFIC PERFORMANCE—PARTIES ENTITLED—INTEREST IN SUBJECT-MATTER. An action for specific performance of a contract to convey land may be maintained by a vendee who has contracted to sell the land to another and is obligated to deliver good title.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS BELOW. An objection that plaintiff has no interest in the subject-matter of the action cannot be first raised on appeal.

PRINCIPAL AND AGENT — BROKERS — AUTHORITY TO SELL LAND — VENDOR AND PURCHASER. Findings that a corporation executing a contract of sale as agent for the owner, another corporation, had authority so to do are sustained where it appears that the first corporation was agent for the other for some purposes, that confidential relations existed between the two, and that the owner did not repudiate the contract when informed thereof, but left it to the president of the agent to say whether it should be fulfilled.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered April 27, 1908, upon findings in favor of the plaintiffs, after a trial before the court without a jury, in an action for specific performance of a contract to convey land. Affirmed.

Gallagher & Thayer, for appellant.

Scott & Campbell and *John W. Rummage*, for respondents.

RUDKIN, C. J.—On the 24th of November, 1905, Arthur D. Jones & Co., as agent for the owner, entered into the fol-

[1]Reported in 99 Pac. 303.

lowing contract with the plaintiff Otto Bittrick for the sale of the real property therein described:

"Received from Otto Bittrick the sum of Twenty & No. ... dollars to apply on the first payment for purchase of lot ten (10) block fifteen (15) Nosler's, with abstract and clear title within five days, at the price of 350.00 dollars, terms 1-3 cash; 1-3 six months; balance 18 months on or before.

"Upon being tendered deed and abstract showing clear title the purchaser shall have three days to comply with the terms herein or forfeit the payment at the option of the owner. Arthur D. Jones & Co., Agent for owner."

This action was thereafter instituted against the Consolidated Improvement Company, as owner of the property, to enforce specific performance of the contract of sale. From a judgment in favor of the plaintiffs, the defendant has appealed.

The right of the respondents to maintain the action, and the authority of Arthur D. Jones & Co. to enter into the contract on behalf of the appellant, are the only questions presented by the appeal. The contention that the respondents cannot maintain the action is based upon the ground that they had contracted to sell the property to one Huber before the commencement of the action. The respondents did not assign their contract, but agreed to sell to another on other and different terms, and are still obligated to deliver good title to their vendee. Their interest in the subject-matter of the contract has not, therefore, ceased, and the action was properly instituted in their names. In any event, this objection was not made in the court below at any stage of the proceeding, and such an objection cannot be raised for the first time in this court.

The material facts relating to the principal transaction are these: The appellant is a corporation, organized for the purpose of handling and managing the property of F. Lewis Clark, who is the owner of substantially all of the corporate stock. Arthur D. Jones & Co. is a corporation

engaged in the real estate, insurance and loan business. Arthur D. Jones is vice president of the Consolidated Improvement Company and president and manager of Arthur D. Jones & Co. W. E. Goodspeed is secretary and treasurer of the Consolidated Improvement Company and the personal representative of Clark, its principal stockholder. The relations between the two corporations have at all times been very close. They maintained the same offices for a time, but whether such was the fact at the time of this particular transaction does not clearly appear. Arthur D. Jones & Co. was the rental agent for the appellant with authority to execute leases in its behalf. It had also acted as a broker at different times in negotiating sales of the appellant's property. It had authority to take contracts from prospective purchasers, furnish abstracts of title, and submit final contracts to the purchasers for execution. The appellant contends, however, that these contracts were ineffectual until approved by Mr. Goodspeed and signed by the company.

The respondents applied to Arthur D. Jones & Co. to purchase the lot in question, and their testimony tends to show that Arthur D. Jones was consulted before the receipt was given. After the receipt was given, Arthur D. Jones & Co. submitted an abstract of title to the purchasers, and after the abstract was approved a formal contract of sale was presented to them for their signatures. This contract the respondent refused to sign because it constituted the secretary of the appellant company their attorney in fact to release the contract of record whenever a forfeiture should be declared for breach of any of the conditions therein contained. As soon as the respondents refused to sign the contract, Arthur D. Jones & Co. broke off all negotiations, tendered back the installment of the purchase price already paid, and demanded a return of the abstract. This tender and demand were refused, and sometime afterwards the respondents applied to Mr. Goodspeed to see if something could

not be done towards carrying out the terms of the contract of sale. They were informed that the matter rested entirely with Arthur D. Jones, and at the request of the respondents, Goodspeed consulted Jones in regard to the matter. Jones refused to yield or to do anything, and the respondents were so informed. This action was the result.

Considering the confidential relations existing between the two corporations and their officers, the fact that Arthur D. Jones & Co. executed the contract, the fact that it was the agent of the appellant, for certain purposes at least, and the further fact that the appellant did not repudiate the contract as soon as it ascertained that the contract had been entered into in its behalf, but instead left it to another to say whether the contract should be fulfilled, we are not prepared to say that the court erred in finding that the contract was obligatory on the appellant.

The judgment is therefore affirmed.

FULLERTON, CHADWICK, and MOUNT, JJ., concur.

CROW, J., took no part.

[No. 7574. Decided January 16, 1909.]

SALLIE GALLER, *Appellant*, v. JAMES McMAHON *et al.*, *Respondents*.[1]

APPEAL—RECORD—STATEMENT OF FACTS—TIME FOR FILING—EXTENSION OF TIME—NOTICE. Under Bal. Code, § 4894, requiring notice to the adverse party of application to extend the time for filing a proposed statement of facts, a notice may be given in the forenoon of an application to be made at 3 o'clock in the afternoon, any reasonable notice being sufficient to confer jurisdiction; Bal. Code, § 4816a, which provides for three days' notice of motions and applications, not applying to proceedings after judgment.

TROVER AND CONVERSION — EVIDENCE OF TAKING MONEY — SUFFICIENCY. In an action to recover money alleged to have been stolen by defendants, there is sufficient evidence of the taking and it is error to grant a nonsuit, where it appears that a large sum of money was in a tin box concealed in the house of the plaintiff, whose husband was away from home, that defendants and a third person helped to extinguish a fire in the house at night, and were the only persons in the house or who had an opportunity to take the money, that defendants knew of the money in the house, one of them was in the house alone for a short time, and was met coming away with his hand held behind his back, and a key to the box was afterwards found in his house, other testimony casting suspicion on the defendants and excluding all probability that the third person took the money.

Appeal from a judgment of the superior court for Yakima county, Rigg, J., entered February 25, 1908, granting a nonsuit, after a trial before the court and a jury, in an action to recover money stolen. Reversed.

Henry J. Snively, for appellant.

Frank A. Luse and *Englehart & Rigg*, for respondents.

RUDKIN, C. J.—This was an action to recover the sum of $3,800, alleged to have been taken or stolen from the plaintiff by the defendants. At the close of the plaintiff's testimony,

[1]Reported in 99 Pac. 309.

the court granted a judgment of nonsuit, and from that judgment the present appeal is prosecuted.

The respondents have moved to strike the statement of facts for the reason that the same was not filed within the time limited by law. It appears from the amended certificate of the trial judge that the appellant served notice on the respondents on the 25th day of March, 1908, that an application would be made to the court at the hour of three o'clock in the afternoon of that day, for an order extending the time for filing a proposed statement of facts on appeal. How long this notice was served before the hearing does not appear further than by the admission of the respondents in their brief that it was served sometime during the forenoon of that day. At the time fixed for the hearing, the respondents appeared specially and objected to the jurisdiction of the court to hear or consider the application, on the ground of insufficient notice. The court overruled the objection and extended the time for filing the proposed statement to and including the 6th day of April, 1908, within which time the statement was filed. The respondents contend that they were entitled to three days' notice of the application, under Bal. Code, § 4816a (P. C. § 300), and that the court acquired no jurisdiction by the giving of notice for the shorter period. We think, however, that this section only applies to hearings or proceedings before judgment. We so construed a similar provision contained in Bal. Code, § 4894 (P. C. § 350), in *National Bank of Commerce v. Seattle Pickle etc. Works.*, 15 Wash. 126, 45 Pac. 731. Bal. Code, § 5062 (P. C. § 679), provides that the time for filing a proposed bill of exceptions or statement of facts may be extended for good cause shown, and on such terms as may be just, by an order of the court or judge before whom the cause is pending or was tried, made on notice to the adverse party. We think that any reasonable notice is sufficient to confer jurisdiction to extend the time under this section, and that the sufficiency of the notice in the matter of time, as well as the

sufficiency of the cause shown, is primarily, at least, for the trial court to determine. There was, therefore, no lack of jurisdiction, and no abuse of discretion appearing, the motion to strike is denied.

There was testimony tending to show the following facts: The appellant and her husband and two small children occupied a seven-room house, in the city of North Yakima. The respondents occupied a house on the adjoining lot, about 45 feet distant from the Galler house. The husband of the appellant went to Spokane on the evening of June 26, 1905, and did not return to North Yakima until the morning of June 28th. Between the hours of twelve and one o'clock, on the night of June 27th, a fire broke out in the Galler house. When the appellant observed the smoke, she broke the front window of the house and took her two children out onto the porch. As soon as she reached the porch, she screamed and the two respondents and a third party came from the McMahon house to the Galler house. After extinguishing the fire, the respondent Mrs. McMahon took the appellant over to the McMahon house, where one of the children had been taken after the fire, the respondent James McMahon remaining alone at the Galler house. In about ten or fifteen minutes thereafter, the appellant returned to her own house with her children, and as she entered she met the respondent James McMahon coming from the house with one hand behind his back. Soon thereafter the third party, who was stopping at the McMahon house, came to the Galler house and remained with the appellant for some time, after which she returned to the McMahon house. The Galler house was locked up from the time the appellant and her children retired in the evening until the time of the fire, and from the time the third party left the house after the fire until the next morning. About five o'clock on the morning after the fire the appellant discovered that the sum of $3,800, which she had concealed in a tin box beneath her pillow, was missing. The testimony tends to show that no person except the two respondents and

the third party to whom we have referred was in the Galler house, or had an opportunity to take the money, and we think the testimony likewise excludes all reasonable probability that this third party took the money or had an opportunity to do so. In addition to the foregoing facts, there were other incriminating circumstances entitled to consideration and weight.

The respondents, or at least the respondent Mrs. McMahon, knew that the appellant had the money in the house, knew that the husband of the appellant was absent in Spokane, knew that he would not return until the morning after the fire, and had made numerous inquiries as to his whereabouts and the time of his return. Mrs. McMahon had been a frequent visitor at the Galler home. One of the keys to the box which contained the money was taken from the Galler house a week or more before the theft, and this key was found in the McMahon house a few days after the theft, and after the respondents had moved therefrom. The conduct of the respondents at and after the fire was not entirely free from suspicion, and there were other facts and circumstances in evidence, but we think we have sufficiently shown that there was ample testimony in support of the allegations of the complaint to warrant and necessitate the submission of the case to the jury.

The judgment is therefore reversed and a new trial ordered.

FULLERTON, CROW, and MOUNT, JJ., concur.

[No. 7585. Decided January 16, 1909.]

JOHN S. KENDALL, *Appellant*, v. C. J. JOHNSON, *Respondent*.[1]

EVIDENCE—PAROL EVIDENCE AFFECTING WRITING—INDEPENDENT CONTRACTORS—MASTER AND SERVANT. In an action against the principal contractor on railroad construction work, for injuries sustained from a blast set off by a subcontractor, it is competent for the plaintiff to show by oral evidence that the relation between the contractors was that of master and servant and that defendant had actual control of the work, regardless of the terms of the written contract between them.

MASTER AND SERVANT—RELATION—TERMS OF CONTRACT. The terms of a written contract held to constitute the relation of an independent contractor.

SAME — LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR — BLASTING. A contractor on railroad work is, generally, not liable for injuries caused by a blast set off by an independent contractor to whom part of the work had been sublet, where the work was not unlawful or the injury due to defective plans or methods, and the work was being done in the mountains far from any human habitation, and was not so inherently dangerous in itself that it would probably result in injury to third persons.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 21, 1908, in favor of the defendant by direction of the court, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained from a blast. Reversed.

John T. Casey (*Heber McHugh*, of counsel), for appellant, contended, among other things, that oral testimony was admissible to show the relations subsisting between the respondent and the firm of Fred Johnson and Company. *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3; *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. 722, 29 Pac. 451; *Oriental Inv. Co. v. Barclay*, 25 Tex. Civ. App. 543, 64 S. W. 80; *Davis v. Bingham* (Tex. Civ. App.), 46 S. W. 840;

[1]Reported in 99 Pac. 310.

Berkeson v. Kansas City Cable R. Co., 144 Mo. 211, 45 S. W. 1119; *Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. 272; *Seattle Land Co. v. Day*, 2 Wash. 451, 27 Pac. 74; *Johnson v. Far West Lumber Co.*, 47 Wash. 492, 92 Pac. 274. A contractee cannot delegate the performance of work which is intrinsically dangerous to an independent contractor, so as to relieve himself from liability to the public or third persons. 26 Cyc. 1559; *Cooper v. Seattle*, 16 Wash. 462, 47 Pac. 887, 58 Am. St. 46; *Covington etc. Bridge Co. v. Steinbrock*, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. 375; *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136; *Halliday v. Telephone Co.*, 22 Q. B. Div. 392; *Pickard v. Smith*, 10 C. B. 470; *Ohio South. R. Co. v. Morey*, 47 Ohio 207, 24 N. E. 269, 7 L. R. A. 701; *Hughes v. Railway Co.*, 39 Ohio St. 461; *Carman v. Steubenville etc. R. Co.*, 4 Ohio St. 399; *Circleville v. Neuding*, 41 Ohio St. 465; *Bower v. Peate*, 1 Q. B. Div. 321; *Bailey v. Troy etc. R. Co.*, 57 Vt. 252, 52 Am. Rep. 129; *Norwalk Gaslight Co. v. Borough of Norwalk*, 68 Conn. 495, 28 Atl. 32; *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894, 78 Am. St. 486; *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17; *Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 21 N. E. 482, 14 Am. St. 427, 4 L. R. A. 213; *James' Adm'r. v. McMinimy*, 93 Ky. 471, 20 S. W. 435, 40 Am. St. 200; 2 Dillon, Mun. Corp. § 1029; *White v. New York*, 15 App. Div. 440, 44 N. Y. Supp. 454; *Lawrence v. Shipman*, 39 Conn. 586; *Thompson v. Lowell etc. R. Co.*, 170 Mass. 577, 49 N. E. 913, 64 Am. St. 323, 40 L. R. A. 345; *City & Suburban R. Co. v. Moores*, 80 Md. 348, 30 Atl. 643, 45 Am. St. 345; *Dalton v. Angus*, L. R. 6 App. Cas. 740; *Hughes v. Percival*, L. R. 8 App. Cas. 443; *Cabot v. Kingman*, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45; *Colgrove v. Smith*, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590; *Jacobs v. Fuller*, 67 Ohio St. 70, 65 N. E. 617, 65 L. R. A. 833; *McMillan v. North Star Mining Co.*, 32 Wash. 579, 73 Pac. 685, 98 Am. St. 908.

George E. de Steiguer, for respondent, contended, *inter alia*, that the contract between Johnson and his subcontractors was in writing and, therefore, to be construed by the court. 16 Am. & Eng. Ency. Law (2d ed.), 192; *Pioneer Fireproof Const. Co. v. Hansen*, 176 Ill. 100, 52 N. E. 17. Under the terms of the contract, Fred Johnson & Co. were independent contractors. *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136; *Cuff v. Newark etc. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; 16 Am. & Eng. Ency. Law (2d ed.), 188; *Callahan v. Burlington etc. R. Co.*, 23 Iowa 562; *School District v. Fuess*, 98 Pa. St. 600; *Anderson v. Tug River Coal & Coke Co.*, 59 W. Va. 301, 53 S. E. 713; *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294; *Miller v. Merritt*, 211 Pa. St. 127, 60 Atl. 508; *Green v. Soule*, 145 Cal. 96, 78 Pac. 337; *Lenderink v. Rockford*, 135 Mich. 531, 98 N. W. 4. An employer is not liable for the acts of contractors engaged in blasting operations. 12 Am. & Eng. Ency. Law (2d ed.), 512; 16 Id. 208; 19 Cyc. 9; *Edmundson v. Pittsburg etc. R. Co.*, 111 Pa. St. 316, 2 Atl. 404; *French v. Vix*, 143 N. Y. 90, 37 N. E. 612; *Blumb v. Kansas*, 84 Mo. 112, 54 Am. Rep. 87; *McCafferty v. Spuyten Duyvil etc. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267.

RUDKIN, C. J.—At the times hereinafter mentioned, the defendant, C. H. Johnson, was under contract with the Chicago, Milwaukee & St. Paul Railway Company to construct from seventy-five to one hundred miles of its road lying west of the city of Ellensburg, in this state. On the 28th day of March, 1907, Johnson entered into a subcontract with Fred Johnson & Co., a firm composed of Fred Johnson and nine other persons, to construct the road between certain designated stations in the vicinity of Easton, Kittitas county. On the 27th day of June, 1907, the plaintiff was employed as cook in a logging camp, maintained by the Cascade Lumber Company a few hundred feet from the rights of way of the Chicago, Milwaukee & St. Paul Railway Company and the North-

ern Pacific Railway Company. While thus employed on the above date, he was struck by a rock hurled by a blast set off by the servants and employees of Fred Johnson & Co., and received personal injuries for which a recovery is sought in this action. The jury returned a verdict in favor of the plaintiff in the sum of $275, but the court directed a judgment for the defendant notwithstanding the verdict, and from that judgment the plaintiff has appealed.

The judgment was directed in favor of the respondent on the ground that Fred Johnson & Co. were independent contractors, and the respondent, C. J. Johnson, was therefore not liable for their negligence in the performance of the subcontract. In support of his appeal, the appellant contends in substance, that the court erred in excluding oral testimony tending to show the actual relations subsisting between the respondent and the firm of Fred Johnson & Co.; that the court erred in holding, as a matter of law, that Fred Johnson & Co. were independent contractors; and that the work of blasting is inherently and intrinsically dangerous, unless proper precaution is taken, and a person cannot evade responsibility in such cases by employing an independent contractor.

(1) The first assignment must be sustained. The appellant was not a party to the contract between the respondent and the firm of Fred Johnson & Co., and never assented to the provisions of that contract. In an action between him and either of the contracting parties he is at liberty to show the true relations subsisting between them, regardless of the relationship which they may have assumed on paper. In other words, it was clearly competent for the appellant to show by oral testimony that the relation of master and servant subsisted between the respondent and the firm of Fred Johnson & Co., and that the respondent had the direction and charge of the blasting which resulted in his injury. *Bright v. Hanover Fire Insurance Co.*, 48 Wash. 60, 92 Pac. 779.

(2) The contract between the respondent and Fred John-

son & Co. is very voluminous, covering three closely printed pages, and no useful purpose would be subserved by setting it forth in this opinion. We deem it sufficient to say that the court did not err in holding that Fred Johnson & Co. were independent contractors, if their status is to be determined from the written contract alone. This question was fully considered in *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136, where the earlier decisions of this court are reviewed.

(3) Does this cause fall within any of the recognized exceptions to the general rule of nonliability, where the work is in charge of an independent contractor? There is some conflict of authority on this question, and no little difficulty in determining the particular exception under which any given case should fall. Generally speaking, where the act which causes the injury is one which the contractor is employed to perform, and the injury results from the act of performance and not from the manner of performance, or where the contractor is employed to do an act unlawful in itself, or where the injury is due to defective plans or methods pursuant to which the work is done, or where the work is inherently or intrinsically dangerous in itself and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented, and in other like cases, a party will not be permitted to evade responsibility by placing an independent contractor in charge of the work. The work of blasting may or may not fall within the exceptions to the general rule, according to the particular circumstances of the individual case, but under the facts here presented, where the parties were employed to construct a railroad grade in the Cascade mountains far removed from any human habitation, we think the general rule of nonliability applies. 12 Am. & Eng. Ency. Law (2d ed.), 512; 16 Id. 208; 19 Cyc. 9; 26 Cyc. 1556; *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17; *Edmundson v. Pittsburg M. & Y. R. Co.*, 111 Pa. 316, 2 Atl. 404; *Blumb v. Kansas City*, 84 Mo. 112, 54 Am. Rep. 87; *French v. Vix*,

143 N. Y. 90, 37 N. E. 612; *McCafferty v. Spuyten Duyvil etc. R. Co.*, 61 N. Y. 178, 19 Am. Rep. 267; *Symons v. Road Directors*, 105 Md. 254, 65 Atl. 1067.

For the error in excluding testimony the judgment is reversed and a new trial ordered.

FULLERTON, CROW, and MOUNT, JJ., concur.

[No. 7711. Decided January 16, 1909.]

TILLIE SCHON, *Respondent*, v. MODERN WOODMEN OF AMERICA, *Appellant*.[1]

APPEAL—REVIEW—WAIVER OF ERROR—NONSUIT. Error in denying a motion for a nonsuit, asked on the ground that the burden of proof had been upon the plaintiff respecting a certain defense, and as to which no evidence was given, is waived where the matter was afterwards fully gone into by the defense.

INSURANCE—ACTIONS—PROOF OF DEATH—EVIDENCE — ADMISSIBILITY. An attending physician's certificate of death is admissible as part of the proofs of death, in an action on a benefit certificate, although it contains a clause giving the cause of death, which was an issue in the action.

APPEAL—REVIEW—HARMLESS ERROR—FACTS OTHERWISE ESTABLISHED. It is harmless error to exclude a physician's certificate of death, stating the cause of death, where the physician testified fully as to the matters contained in the certificate.

TRIAL — INSTRUCTIONS — NECESSITY OF WRITTEN INSTRUCTIONS. Where a stenographic report of instructions to the jury is made by a stenographer employed by both parties, he is sufficiently under the control of the court to constitute his report "instructions in writing," within the meaning of Laws 1903, p. 119, § 1, requiring written instructions upon demand, provided that a stenographic report of the charge shall be considered a charge in writing (Overruling *McIntosh v. Sawmill Phoenix*, 49 Wash. 152.).

INSURANCE—ACTIONS—CAUSE OF DEATH—EVIDENCE—REMOTENESS. In an action upon a benefit certificate, evidence of a liquor bill for $30, owed by deceased and that the same was purchased for his own use, is too remote to require its admission upon an issue as to whether death resulted from intemperance.

[1]Reported in 99 Pac. 25.

SAME—DEFENSES—INTEMPERANCE—STATEMENTS IN APPLICATION. In an action upon a benefit certificate, the defendant cannot rely upon a statement in the deceased's application that he had always been an total abstainer, where the application further stated that he was "almost" a total abstainer and drank beer once in a great while.

SAME—INSTRUCTIONS—COMMENT. In an action upon a benefit certificate, an instruction giving, as the judge's best definition of "intemperate," the immoderate use of intoxicating liquor, with the comment that he did not know any more about it than he did before, is not erroneous.

SAME—INTEMPERANCE—INSTRUCTIONS. In an action upon a benefit certificate, providing that if the member should become intemperate in the use of alcoholic drinks, or if death resulted from intemperate use thereof, the certificate should be void, it is proper to instruct the jury that the deceased was not "intemperate" within the meaning of the certificate, even though he drank to excess upon exceptional occasions, unless he was addicted to periodical and excessive indulgences which became habitual.

APPEAL—REVIEW—VERDICTS. A verdict will not be disturbed on appeal although supported only by evidence largely of a negative character.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered January 24, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a benefit certificate of life insurance. Affirmed.

Benj. D. Smith, T. W. Bartley, and *Arthur W. Davis,* for appellant.

Merritt, Oswald & Merritt, for respondent.

RUDKIN, C. J.—Three several actions were instituted in the court below by the beneficiaries named in a benefit certificate issued by the defendant to one Charles Martin Schon now deceased. The three actions were identical in all respects except as to parties plaintiff, and were consolidated for trial. We will therefore refer to them hereafter as a single action. The complaint was in the usual form in such cases, alleging the issuance of the benefit certificate to the deceased; that the deceased paid all dues and assessments and

complied with all rules, regulations and requirements of the certificate during his lifetime; the death of the insured; the proofs of death; the rejection of the proofs, and the refusal to pay; the appointment of a guardian *ad litem* for the minor plaintiffs, etc. The answer admitted the issuance of the certificate, denied that the deceased was a benefit member of the defendant in good standing, and set forth three affirmative defenses as follows: First, that the application, by-laws, and certificate, constituted the contract between the defendant and the deceased; that the certificate provided that the literal truth of the application and each and every part thereof should be held to be a strict warranty and to form the only basis of liability of the defendant to its members; that, if said application was not literally true in each and every part thereof, the benefit certificate should be absolutely null and void; that the application contained the following questions and answers:

"Q. Do you abstain entirely from the use of intoxicating liquors? A. Almost. Q. How long have you been a total abstainer? A. Always. Q. Were you ever intoxicated? A. No. Q. Do you use intoxicating liquors daily? A. No. Q. State kind and quantity consumed. A. Beer, once in a great while;"

and that said answers were untrue. Second, that the certificate provided that, if the deceased should become intemperate in the use of alcoholic drinks, the certificate should become null and void, and that prior to his death the deceased did become intemperate in the use of intoxicating liquors. Third, that the certificate provided that, if the death of the member should result directly or indirectly from the intemperate use of intoxicating liquors, the certificate should become null and void, and that the death of Schon did result from the intemperate use of intoxicating liquors. The affirmative defenses were put in issue by reply, and the case came on for trial. The jury returned a verdict in favor of the plaintiff, and from the judgment entered in conformity thereto this appeal was taken.

The first error assigned is in the denial of a motion for nonsuit. In support of this assignment the appellant contends, that inasmuch as the answer denied that the deceased was ever a member in good standing, and pointed out certain answers given by the deceased which were alleged to be untrue, the burden of proof was on the respondent, in the first instance, to establish the truth of the answers thus singled out and challenged. If we were to concede the correctness of the rule of law thus contended for, which we do not (*Piedmont etc. Life Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610; *Port Blakeley Mill Co. v. Hartford Fire Ins. Co.*, 50 Wash. 657, 97 Pac. 781), any error in denying the motion for nonsuit in this case was clearly waived, as the question of the truth or falsity of the several answers challenged was fully gone into by the defense.

The refusal of the court to admit in evidence the death certificate given by one of the physicians who attended the deceased during his last illness, which was appended to and made a part of the proofs of death, is next assigned as error. The certificate, among other things, contained the following question and answer:

"Q. State the remote cause of death; if from disease, give predisposing cause, date of first appearance of its symptoms and history of its symptoms during the progress? A. Hepatic cirrhosis. Alcoholism about six months before death."

Under the authorities, this certificate was admissible in evidence as a part of the proofs of death, and the court erred in rejecting it, but inasmuch as the physician was afterwards called by the appellant and testified fully and exhaustively in its favor as to all the matters contained in the certificate, it seems to us that the error was not prejudicial. *Modern Woodmen of America v. Davis*, 184 Ill. 236, 56 N. E. 300.

The next error assigned is the refusal of the court to instruct the jury in writing. This question was fully considered by this court in *Collins v. Huffman*, 48 Wash. 184, 93 Pac. 220; and *Sturgeon v. Tacoma Eastern R. Co.*, *ante* p.

124, 98 Pac. 87, under a similar state of facts and was decided adversely to the appellant.

The next error assigned is the refusal of the court to admit evidence tending to show that the deceased owed one Ekberg a liquor bill of $30, contracted during the existence of the benefit certificate in suit, accompanied by proof of admissions by the deceased that he had purchased the liquor for his own use, and intended to pay therefor. While this proof might properly have been received as a circumstance tending to show the habits of the deceased, we think its tendency to show that the deceased was intemperate in his habits or that death resulted from intemperance was entirely too remote to warrant a reversal of the judgment.

The court instructed the jury that the appellant was bound by the answer contained in the application to the effect that the deceased drank beer once in a great while, notwithstanding his answer to the question, "How long have you been a total abstainer?" was "Always." This instruction was correct. The deceased had said that he was almost a total abstainer and that he drank beer once in a great while, and in the face of these admissions or statements the appellant could not rely upon or take advantage of his answer to another question to the effect that he had always been a total abstainer. The appellant contends that no estoppel was pleaded, but this is not a question of estoppel at all. It is a mere construction of the answers taken as a whole.

The appellant excepted to the following instruction: "The best definition I can give you of the word 'intemperate' so far as the intemperate use of intoxicating liquor is concerned, is the immoderate use of intoxicating liquor. I don't know whether you know any more about it now than you did before. I don't." While the comment of the court might well have been omitted, we cannot see that the instruction was either erroneous or prejudicial. The statement of the court simply indicated to the jury that the word intemperate did

not admit of any precise definition, although well understood by the public.

The following instruction was also excepted to:

"The jury are instructed that the assured, Charles Martin Schon, was not intemperate in the use of alcoholic liquors or beverages within the meaning of the word 'intemperate' as used in the benefit certificate and by-laws of the defendant society, even though you believe, from the evidence of this case, that he drank alcoholic liquors or beverages to excess upon exceptional occasions, unless you further believe from a preponderance of the testimony in this case, that said assured was addicted to periodical and excessive indulgences in the use of alcoholic liquors or beverages which became habitual."

We think this instruction contains a correct statement of the law applicable to this class of actions. *Holtum v. Germania Life Ins. Co.*, 139 Cal. 645, 73 Pac. 591; *Knickerbocker Life Ins. Co. v. Foley*, 105 U. S. 350, 26 L. Ed. 1055; *National Fraternity v. Karnes*, 24 Tex. Civ. App. 607, 60 S. W. 576; *Mutual Life Ins. Co. v. Simpson* (Tex. Civ. App.), 28 S. W. 837.

The remaining assignment relates to the sufficiency of the testimony to sustain the verdict. The appellant requested the court to submit a number of special interrogatories to the jury, and the request was granted. These interrogatories covered every material issue in the case, and were each and all answered in favor of the respondent. The appellant complains that the testimony in support of the findings of the jury was largely of a negative character, but negative testimony is competent, and at times the only testimony by which an issue may be established. *Puls v. Grand Lodge A. O. U. W.*, 13 N. D. 559, 102 N. W. 165.

The testimony was sufficient to sustain the findings of the jury, and the judgment is affirmed.

FULLERTON, CROW, and MOUNT, JJ., concur.

[No. 7491. Decided January 16, 1909.]

C. M. SPAULDING, *Appellant*, v. ANGIE B. COLLINS *et al.*, *Respondents*, VALERIA M. SPAULDING, *Appellant*.[1]

EQUITY—LACHES—TRUSTS IN REAL ESTATE—LAPSE OF TIME. Where a husband and wife conveyed premises on which they lived to a third party, under a verbal agreement that the grantee would redeem the same from a mortgage and hold the same in trust for his wife, and the husband afterwards left the state, secured a divorce from his wife, and made no claim to the property for twenty years, he is barred by laches from setting up the trust or asserting any interest in the land.

TRUSTS—EXPRESS OR RESULTING TRUSTS—ORAL EVIDENCE TO ESTABLISH. An absolute deed for the expressed consideration of one dollar, made to a third person by mortgagors pending foreclosure, under an oral agreement by the grantee to advance the money to redeem from the mortgage and to hold the land in trust for the use of one of the mortgagors until the sum advanced is repaid, is an express and not a resulting trust, and oral evidence is inadmissible to establish the same, under Bal. Code, § 4517, requiring contracts creating an incumbrance on real property to be by deed.

SAME—PART PERFORMANCE—ADVERSE POSSESSION BY GRANTOR. In such a case, continued possession of the mortgaged property by the mortgagor *cestui que trust* for twenty years after execution of the deed, by consent of the grantee and without payment of rent or any accounting, is not such part performance of the trust as to take the same out of the operation of the statute of frauds, or to permit of parol evidence to establish the trust; and such possession is not adverse to the grantee.

Appeal from a judgment of the superior court for King county, Frater, J., entered December 20, 1907, upon findings in favor of the defendants, after a trial before the court without a jury, in an action to declare a trust and for an accounting. Affirmed.

Fairchild & Bruce, for appellants, contended, among other things, that where one conveys property but retains possession under parol contract for a reconveyance, continuing in

[1]Reported in 99 Pac. 306.

a possession theretofore initiated is part performance sufficient to satisfy the statute and admit parol evidence to show the actual facts. *Peck v. Stanfield*, 12 Wash. 101, 40 Pac. 635; *Latham v. Scribner*, 45 Wash. 266, 88 Pac. 203; *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305; *Miller v. Ausenig*, 2 Wash. Ter. 22, 3 Pac. 111; *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634; *Holly Street Land Co. v. Beyer*, 48 Wash. 422, 93 Pac. 1065. The arrangement, so far as Collins is concerned, operated precisely as though he had been Colman. *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18; *Wolford v. Herrington*, 74 Pa. St. 311, 15 Am. Rep. 548; *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840. The evidence clearly indicates a relation of trust and confidence. *Trotter v. Smith*, 59 Ill. 241. The property was community property. *Gund v. Parke*, 15 Wash. 393, 46 Pac. 408. Upon the dissolution of the marriage it became joint property. *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103; *Graves v. Graves*, 48 Wash. 664, 94 Pac. 481. The deed was given to Collins for the purpose of protecting him and Colman against any loss, and constituted an equitable mortgage. *Borrow v. Borrow* and *Peterson v. Hicks, supra; Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775; *Russell v. Wade*, 146 N. C. 116, 59 S. E. 345. There was in the transaction the promise on the part of Collins to pay the mortgage and taxes and make future advances. The absence of written evidence could not abridge the fact. *Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. 892. The arrangement was that Collins would enlarge the credit of Mrs. Spaulding and charge interest on it. This was more than enough to show the relation of debtor and creditor. *Stephens v. Allen*, 11 Ore. 188, 3 Pac. 168; *Snavely v. Pickle*, 29 Gratt. 112; *Montgomery v. Spect*, 55 Cal. 352; *Crane v. Buchanan*, 29 Ind. 570; *Brant v. Robertson*, 16 Mo. 129; *Turner v. Wilkinson*, 72 Ala. 361. Great stress is justly laid upon the fact that what is alleged to

have been the price bore no proportion to the value of the thing said to have been sold. *Russell v. Southard*, 12 How. 139; *Stevens v. Allen, supra; Gilchrist v. Beswick*, 33 W. Va. 168, 10 S. E. 371; *Robinson v. Farrelly*, 16 Ala. 472; *Reed v. Reed*, 75 Me. 264; *Daniels v. Lowery*, 92 Ala. 519, 8 South. 352; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671. Where doubt arises whether a transaction was a sale or a mortgage, it will be held to be the latter. *DeBruhl v. Maas*, 54 Texas 464; *Eaton v. Green*, 22 Pick. 526; *Locke's Ex'r v. Palmer*, 26 Ala. 312; *Lawrence v. DuBois*, 16 W. Va. 443. The statute of limitations has no application, since there was the continued debt in the Whitney mortgage, and the continuing debt in favor of Collins, with the mortgagors in continued possession. *Jackson v. Lynch*, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246. If there was not the relation of debtor and creditor, there was a trust, a constructive trust or a trust *ex maleficio*. If it was a mortgage only, continued possession of the mortgagor was a condition which time would ripen into a title, ending the right of foreclosure, title going to the mortgagor and not to the mortgagee. *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142. If a continuing trust, the statute of limitations could not intervene until the trust had been repudiated in unequivocal terms. *Jackson v. Lynch, supra*. If Collins took the property originally as a security for his advances and afterwards conceived the idea of keeping it as his own, he violated the confidence reposed in him, and became thenceforth a trustee *ex maleficio*. *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116, 33 Am. St. 229; *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270; Perry, Trusts, § 171; *Clark v. Haney*, 62 Tex. 511, 50 Am. Rep. 536; *Rollins v. Mitchell*, 52 Minn. 41, 53 N. W. 1020, 38 Am. St. 519. If there was no intention upon the part of Collins to reconvey the property to Valeria Spaulding, then her title is perfect by adverse possession. *Olson v. Howard*, 38 Wash. 15, 80 Pac. 170;

Kline v. Stein, 30 Wash. 189, 70 Pac. 235; *Northern Pac. R. Co. v. Hasse*, 28 Wash. 353, 68 Pac. 882, 92 Am. St. 840. When a mortgagee in fact takes as security a deed in form, an attempt to convert such a mortgage into an absolute deed is such a fraud as equity will correct, and hear parol evidence to enable it to do so. *Sprigg v. Bank of Mt. Pleasant*, 14 Pet. 201, 10 L. Ed. 419; *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927; *O'Neill v. Capelle*, 62 Mo. 202. Where a speedy demand or notice to pay would manifestly violate the purposes of the contract, or where delay in making the demand was contemplated by the express terms of the contract, a demand need not be made within the statutory period. 2 Perry, Trusts, § 863; *Daugherty v. Wheeler*, 125 Ind. 421, 25 N. E. 542; *Neyland v. Bendy*, 69 Tex. 711, 7 S. W. 497.

Hughes, McMicken, Dovell & Ramsey, for respondents.

MOUNT, J.—The appellant C. M. Spaulding brought this action against the estate and heirs of John Collins, deceased, and also against Valeria M. Spaulding, alleging that certain real estate in King county was conveyed by the appellants to John Collins in trust; and he prayed that the trust be declared, the property sold, and an accounting be had between the appellants and the estate of said Collins, and that the balance, if any, be paid to the appellants. The estate and heirs of John Collins, deceased, denied that there was any trust; and Valeria M. Spaulding answered by way of cross-complaint, alleging substantially the facts set up in the complaint. After a trial, the court concluded that the alleged trust deed was the result of an express trust which could not be proved by parol, and that there was no other evidence of a trust, that the deed was not a mortgage, and that the appellants are now barred by laches; and therefore dismissed the action. The plaintiff C. M. Spaulding and cross-complainant Valeria M. Spaulding have appealed.

The facts are substantially as follows: In the year 1885 the appellants were husband and wife. They lived in Seattle

upon six lots, being the lots in question, which lots were then their community property. These lots were mortgaged for $4,100, one mortgage for $3,500 upon four of them, and another mortgage for $600 upon the other two. C. M. Spaulding at that time was owing many debts which were unsecured. Some or all of these debts were surety and personal obligations. In August, 1885, the holder of the mortgage for $3,500 brought an action to foreclose the same, and on October 27, 1885, a decree of foreclosure was entered for $4,055.33, and $202.76 costs. On the next day, viz., October 28, 1885, while that action was pending, and while the appellant Valeria M. Spaulding was living upon the property, she and her husband, for an expressed consideration of one dollar, executed and delivered a deed conveying the property to John Collins, subject to the mortgage for $3,500. There was nothing in the deed itself to show a trust, and there was no written declaration of trust. But the oral evidence is to the effect, that Collins paid nothing for the deed of conveyance; that he was requested by Mrs. Spaulding and one J. M. Colman to take the title to the lots so as to protect the same from the claims of creditors of C. M. Spaulding. Afterwards there was some talk between Mr. Colman and Mr. Collins to the effect that they together would help Mrs. Spaulding redeem from the mortgage foreclosure, and hold the property or sell it, and after reimbursing themselves for expenses, pay the balance, if any, to Mrs. Spaulding. Mr. Colman thereafter advanced some $2,756 to Mr. Collins for that purpose, and Mr. Collins advanced a much larger amount. After the execution of this deed, Mrs. Spaulding continued to reside upon the property, which was improved with a house and barn and a small orchard. At the time of the execution of this deed, the grantors were not indebted to the grantee, and there was no fiduciary relation existing between them, and there was no obligation on the part of the grantee to redeem the property from the mortgages, and no obligation on the part of the grantors to repay the money which the grantee might

thereafter advance. Appellant C. M. Spaulding left Seattle about this time and went to Portland, Oregon, where he secured a divorce from Valeria M. Spaulding on May 17th, 1888. Since that time the appellants have lived apart.

After taking the deed above mentioned, Mr. Collins advanced considerable sums of money for the payment of taxes, grade and sidewalk assessments, and interest on the mortgage debt, until January, 1890, when he paid the amount due on the mortgage, which had been foreclosed, and the judgment of foreclosure was satisfied. In the year 1891, Mr. Collins and wife mortgaged all the property in question, with other property, to secure debts of their own. About the time these mortgages were given by Mr. Collins, some new arrangement was made between Mr. Collins and Mrs. Spaulding, but the nature of that arrangement is not shown, except that thereafter Mr. Collins advanced small sums of money to Mrs. Spaulding, who continued to reside upon the property. Later, in 1894 and 1897, these mortgages were foreclosed and the property sold to third parties. But afterwards, in 1899, Mr. Collins repurchased the property. Between the years 1893 and 1899 the value of the property did not exceed the cost to Mr. Collins; but after the year 1899, the value began to appreciate, until at the time of the trial the value of the property was about $65,000.

In the year 1903 Mr. Collins died, and his executors took charge of the property. It was shown that Mr. Collins during his lifetime kept separate accounts of all his property, the cost, expenses, and improvements were charged against each property owned by him or in which he was interested, and the revenue therefrom was credited to each. An account of this kind was kept of the property in question. It was denominated the "Spaulding Property a-c," which showed that this property on January 1, 1903, had cost him more than $20,000. Mrs. Spaulding never paid any rent for the use of the property, but has resided thereon to the present time; and since she has been in possession Mr. Collins and his em-

ployees have made all improvements and looked after the property generally. At one time, in about the year 1889, it was proposed to sell the property, but Mrs. Spaulding objected, and the sale was not made. In the year 1901, Mr. Colman suggested that then would be a good time to sell the property so that he and Mr. Collins would both get their money out of it. Mr. Collins consented, but no sale was made. In the year 1905, or more than twenty years after the making of the deed, the appellant C. M. Spaulding brought this action to declare the deed a trust deed. This is in brief the substance of the material facts.

It is contended by the appellants that the continued possession of Valeria M. Spaulding is such part performance of the trust agreement as to take the case out of the rule that an express trust in real property may not be shown by parol evidence, and that if Mr. Collins took the title as security for future advances, and afterwards conceived the notion of keeping the property for his own, he became a trustee *ex maleficio*, which may be shown by parol. As to the appellant C. M. Spaulding, we are satisfied that he is barred by laches from claiming any interest in the property. He parted with all his interest in the property, by a deed regular in form, more than twenty years before he brought this action. In that time he made no claim to the property, but on the contrary, when his creditors were seeking to collect on their claims, he stated that he had no property of any kind and no interest in this particular property. He has stood by during all these years and made no effort to reclaim the property in any way. When the property was taken over by Mr. Collins in the year 1885, there is no evidence of any kind that it was to be held for C. M. Spaulding. The oral evidence is that the trust was for the benefit of Mrs. Spaulding alone. Under these facts C. M. Spaulding is clearly barred by laches.

Under the view we take of the case, it is not necessary to decide the question of laches as applied to Valeria M. Spauld-

ing. We are satisfied from the evidence of Mr. J. M. Colman, who was the only witness who testified as to what the trust agreement really was, that the trust, if any, was an express trust, and not a trust *ex maleficio*, or resulting trust. This witness testified that Mrs. Spaulding wanted his son to take the deed, but that witness objected.

"So she spoke of Mr. Collins. I told her I would see him, and I saw Mr. Collins about it. . . . There was no talk about his buying the property. She did not talk about his buying the property. What she wanted was to have it deeded over to him until she could pay his debts. . . . She was afraid, she said, that her husband was running bills and they would be after her for the money and it might come against her property; that was the reason she wanted to get rid of it. She wanted it turned over to somebody that would protect her."

We think this evidence clearly shows an express trust which cannot be established by parol. *Holly Street Land Co. v. Beyer*, 48 Wash. 422, 93 Pac. 1065.

There is no evidence of bad faith on the part of Mr. Collins, at the time the deed was made or subsequently. There is no evidence that the Spauldings were indebted to Mr. Collins at that time, or that Mr. Collins agreed to advance any money on account of the deed; and no circumstances which would take the case out of the general rule, as there were in the cases of *Holly Street Land Co. v. Beyer, supra*, or *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305, and *Peterson v. Hicks*, 43 Wash. 412, 86 Pac. 634, therein cited, all of which are relied upon by the appellants. The rule is well settled under statutes like ours—Bal. Code, § 4517 (P. C. § 4435), providing that contracts creating incumbrances upon real estate shall be by deed—that it is only when fraud, actual or constructive, intervenes that equity will permit a trust agreement to be proved by parol. *Monson v. Hutchin*, 194 Ill. 431, 62 N. E. 788; *Benson v. Dempster*, 183 Ill. 297, 55 N. E. 651; *Krebs v. Lauser*, 133 Iowa 241, 110 N. W. 443; *Rogers v. Richards*, 67 Kan. 706, 74 Pac. 255; *Thomas v. Churchill*,

48 Neb. 266, 67 N. W. 182; *Kinsey v. Bennett*, 37 S. C. 319, 15 S. E. 965; *Coffey v. Sullivan*, 63 N. J. Eq. 296, 49 Atl. 520; *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509; 15 Am. & Eng. Ency. Law (2 ed.), p. 1192, and cases cited.

In *Hillman v. Allen*, *supra*, the court said:

"The essential inquiry that arises upon this record is whether the trust sought to be proved and enforced is an express trust or an implied resulting trust. If express, there can be no resulting trust, and parol evidence is not admissible to prove that an absolute conveyance was made upon an express trust not declared in the writing itself. *Green v. Cates*, 73 Mo. 115; *Kingsbury v. Burnside*, 58 Ill. 310; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379. The character of the alleged trust in this case must be ascertained from the petition, and the evidence offered in support thereof. . . . the father conveyed said real estate by deed absolute to his son without qualification or limitation of any kind in the deed, and contemporaneously imposed upon the son the express parol trust to sell the lot as trustee for his father, pay off the liens, and refund the balance. If these averments and this testimony do not charge an attempt to establish an express trust of lands, then it would be difficult indeed to define an express trust within the meaning of the statute."

Appellants seek to avoid this rule by claiming that the continued possession of Mrs. Spaulding was a part performance and therefore took the case without the rule. In the case of *Borrow v. Borrow*, *supra*, where we held that a grantee named in a deed was a mortgagee, we said at page 689:

"The respondents had possession of the land from the time of the purchase. They had, however, been in possession as tenants of the former owner, and appellant contends that there was therefore no taking possession under the contract, amounting to part performance, which takes the case without the statute of frauds. The authorities cited by appellant sustain the view that mere continuance of possession, where one is already in occupancy, is not itself a part performance."

Mrs. Spaulding's possession in this case was of the kind there referred to. She simply continued in occupancy and nothing more. Her occupancy did not constitute an adverse holding.

"By the execution and delivery of a deed of land the entire legal interest in the premises vests in the grantee, and if the grantor continues in possession afterward his possession will not be that either of tenant or trustee of the grantee. He will be regarded as holding the premises in subserviency to the grantee, and nothing short of an explicit disclaimer of such relation and a notorious assertion of right in himself will be sufficient to change the character of his possession and render it adverse to the grantee." 1 Cyc. 1039.

It is, therefore, quite clear that the mere continued possession of the granted premises by Mrs. Spaulding was not a part performance sufficient to avoid the general rule as above stated. The deed in this case cannot be considered as a mortgage by reason of the fact that there never was any debt owing by either of the appellants of the grantee, nor was there any obligation by the appellants or either of them to pay any advances made by the grantee. There is nothing in the record to show any bad faith on the part of the grantee. The trust, if any exists, is an express trust which cannot be proved by parol, and equity will not therefore interfere to change the contract from what it appears upon its face to be.

The judgment must therefore be affirmed.

RUDKIN, C. J., CROW, and FULLERTON, JJ., concur.

DUNBAR and CHADWICK, JJ., took no part.

[No. 7685. Decided January 16, 1909.]

SCHOOL DISTRICT NO. 20, SPOKANE COUNTY, *Respondent*, v. R. B. BRYAN, *as State Superintendent of Public Instruction, et al., Appellants.*[1]

SCHOOLS AND SCHOOL DISTRICTS—COMMON SCHOOLS. A common school, within Const., art 9, § 2, means one that is common to all children of proper age and capacity, free, and subject to, and under the control of the qualified voters of the district.

SAME—FUNDS—APPORTIONMENT—COMMON SCHOOLS—STATE NORMAL TRAINING DEPARTMENT. Under the constitutional and statutory provisions differentiating between the common school and the normal school, a model training department of a state normal school wherein a portion of the school children in a district are given instruction which they would otherwise receive in the district schools, is not a part of the common schools of the state, within Const., art. 9, § 2, requiring the common school fund to be applied exclusively to the support of the common schools; as such a department is not under the control of the districts or common to all children of proper age or a part of our uniform system of schools, and its main purpose is to benefit the normal pupil; hence Laws 1907, p. 180, § 4, apportioning part of the common school fund of a district to the maintenance of such a model training school is void.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered February 13, 1908, in favor of the plaintiff, after a trial before the court without a jury, in an action to enjoin the apportionment of a portion of the common school fund to a state normal school. Affirmed.

John D. Atkinson, Attorney General, and *William W. Manier, Assistant*, for appellants, contended that the model training school contains the characteristics essential to constitute it a common school, within the constitution. *People v. Board of Education*, 13 Barb. 400; *Roach v. Board of Directors*, 7 Mo. App. 567. The phrase "common schools" is synonymous with "public schools." *Jenkins v. Andover*, 103 Mass. 94. Both have been defined by lexicographers and by

[1]Reported in 99 Pac. 28.

judicial interpretation to mean "free schools." *Merrick v. Inhabitants of Amherst*, 12 Allen 509; *Roach v. Board of Directors*, 77 Mo. 484; *Collins v. Henderson*, 74 Ky. 74; *Irvin v. Gregory*, 86 Ga. 605, 13 S. E. 120; *Roach v. Board*, 7 Mo. App. 567. They are, as a general rule, free schools supported by general taxation. 25 Am. & Eng. Ency. Law (2d ed.), 8; Law Dictionaries of Black, Anderson, Rapalje & Lawrence, Bouvier; 2 Kent, Commentaries, p. 195. The unconstitutionality of the act must be clearly shown. *Board of Directors of Middle Kittitas Irr. Dist. v. Peterson*, 4 Wash. 147, 29 Pac. 995; *State ex rel. School Dist. No. 24 v. Grimes*, 7 Wash. 270, 34 Pac. 936. The law will not be declared unconstitutional unless it clearly violates some express provision of the constitution. 1 Remington's Digest, page 517, and cases there cited.

W. H. Winfree, for respondent. No part of the revenue of the permanent school fund can be used directly or indirectly for normal schools or any similar institution. *State Female School v. Auditors*, 79 Va. 233; *Gordon v. Cornes*, 47 N. Y. 608; *State ex rel. Cutting v. Westerfield*, 24 Nev. 29, 49 Pac. 554; *People v. Board of Education*, 13 Barb. 400; *Underwood v. Wood*, 93 Ky. 177, 19 S. W. 405, 15 L. R. A. 825; *Hall's Free School v. Horne*, 80 Va. 470; *Halbert v. Sparks*, 72 Ky. 259; *Collins v. Henderson*, 74 Ky. 74. The model training school not being under the control of agents appointed by the voters and not being open to all of suitable age and attainment, is not a common school within the meaning of the constitution. 25 Am. & Eng. Ency. Law (2d ed.), page 8; *Jenkins v. Andover*, 103 Mass. 92; *Merrick v. Inhabitants of Amherst*, 12 Allen 509; *Board of Education v. Dick*, 70 Kan. 434, 78 Pac. 812; *People v. Board of Education*, *Hall's Free School v. Horne*, and *Underwood v. Wood*, *supra*; *Los Angeles County v. Kirk*, 148 Cal. 385, 83 Pac. 250; *Halbert v. Sparks* and *Collins v. Henderson*, *supra*. The portion of the act complained of violates the con-

stitutional provision prohibiting a special law authorizing the apportionment of any part of the school fund. *Terry v. King County*, 43 Wash. 61, 86 Pac. 210; *Louisville School Board v. Louisville*, 103 Ky. 421, 45 S. W. 1047; *Plummer v. Borsheim*, 8 N. D. 565, 80 N. W. 690. And also violates the provision for a general and uniform system of public schools. *Ellis v. Greaves*, 82 Miss. 36, 34 South. 81; *Sellers v. Cox*, 127 Ga. 246, 56 S. E. 284; *Louisville School Board v. Louisville* and *Plummer v. Borsheim*, *supra*.

CHADWICK, J.—In order to make effectual Bal. Code, § 2550 (P. C. § 7463), the legislature of this state, at its 1907 session, passed a law (Laws 1907, page 180, chapter 97) providing for a model training school department to be established in the State Normal Schools. Its purpose is manifest. It is to provide material for the particular training of teachers, and to this end the boards of the several normal schools are authorized, and it is made their duty, to file, on or before the first Monday in September in each year, with the board of the school district in which the normal school is situate, a requisition for the estimated number of public school pupils necessary to make up a model training school. It is thereupon made the duty of the local board to apportion a sufficient number of pupils to meet the requisition. It is also provided that the principal of the normal school may refuse to accept such pupils as, in his judgment, by reason of incorrigibility or mental defects, would tend to reduce the efficiency of the training department. It is made the duty of the school clerk to keep a segregated list of those attending the model school, and further:

"That it shall be the duty of the Superintendent of Public Instruction to apportion to the support of such normal training school out of the funds available for the support of the common schools of the district in which each normal school is situated, such proportion of the funds to which such school district shall be entitled as the number of pupils in attendance upon each such model training school, bears to the

whole number of pupils upon which the apportionment was made for the common schools in the school district in which such normal school is situated, and the funds so apportioned shall be distributed by the board of trustees for the maintenance of such model training school." Section 4.

Plaintiff brought an action in the superior court of Thurston county to restrain the defendant, as superintendent of public instruction, from apportioning to the model training department of the state normal school, located at Cheney, Washington, any of the funds available for the support of the common schools. From an order directing an injunction, and also holding:

"That so much of chapter 97, Laws 1907, 'Entitled an act relating to the model training school department of normal schools, authorized by section 7463 of Pierce's Code, section 2550 of Ballinger's Annotated Codes and Statutes of Washington, and providing for apportionment of funds therefor,' approved March 11, 1907, which seeks to apportion or appropriate any part of the common school fund or revenue therefrom or state tax for the support of the common schools is unconstitutional and void,"

the defendants have appealed.

The assignments of error, four in number, all go to the question, does the act provide for a diversion of the common school fund in contravention of the following constitutional provisions:

"The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools." Const., art. 9, § 2.

" . . . The interest accruing on said fund, together with all rentals and other revenues derived therefrom, and from lands and other property devoted to the common school fund, shall be exclusively applied to the current use of the common schools." Const., art. 9, § 3.

Counsel for appellants have made an elaborate research of the authorities in order to arrive at a proper definition of the words "common school," and from them deduced the following: "The essential characteristics therefore of a common school are, (1) they must be maintained at public expense; (2) they must provide a course of elementary education for children of all classes of people." He concludes that the model training school comes within this definition, and is therefore a common school within the meaning of the constitution.

The word "definition" is in itself difficult to define. What would be proper under a given state of facts may be impossible under another. A word must be accepted with reference to its relation to other words and terms. The words "common school" cannot be arbitrarily defined, but must be considered in connection with the general scheme of education outlined in the constitution of the state. When so considered, they have no uncertain meaning. In adopting a constitution, the people of this state saw fit to devote a chapter to the subject of education. In it they were careful to emphasize the importance, as well as the distinct character, of the common school. They endeavored to protect and preserve the funds set apart by law for the support of the common school from invasion, so that they might be applied exclusively to the current uses of such schools. An ample provision for the education of children was made paramount, and the duty was imposed upon the legislature of providing a general and uniform system of public schools. The system provided differentiates between the common school and the normal school, as does the constitution, and when adopted such system has the force of the constitutional provision which it elaborates. The system must be uniform in that every child shall have the same advantages and be subject to the same discipline as every other child. A system of control through school boards and county superintendents is provided for, their duties defined, and a method supplied to secure, in theory at least,

efficient teachers and instructors. When considered in this way, it would seem that the definition arrived at by counsel is too narrow. The words "common school" must measure up to every requirement of the constitution and code of public instruction, and whenever by any subterfuge it is sought to qualify or enlarge their meaning beyond the intent and spirit of the constitution, the attempt must fail.

The propriety and benefit of the scheme are urged by counsel. They say:

"Here we have a model training school, which is a portion of a state normal, which has as principal a person chosen for that position because of his experience as an educator, who gives personal supervision to the instruction of a certain number of the pupils who would otherwise be attending other graded schools of the district. The principal has under his charge a corps of teachers who are making a study, a science, of the art of school teaching. Experience will show the benefits to the pupils attending this department. The pupils are chosen in some way, mayhap by lot, or by the directors of the district; mayhap, as being residents within a certain portion of the district in the vicinity of the normal school; mayhap, as being pupils in a certain grade or grades. They are residents of the same district; they pursue the same studies; in all probability receive better and more careful instruction than do the others who attend the other common schools within the district. Why is that not a common school within the meaning of the men who framed the constitution? There are no essentials lacking."

With these considerations we can have no concern. But if it were otherwise, the argument meets itself and furnishes abundant reason why the act in question cannot be sustained. The principal of the normal school, however accomplished, is not an officer recognized by the law creating the common school system, and is in no way answerable to those who are charged with the duty of executing it. The teachers under his charge may be devoted in their pursuit of the art of teaching, but they are not teachers within the meaning of the law which has undertaken to insure that public school children

shall be taught only by those who have met (not those seeking to attain) a certain standard of proficiency. In other words, the argument of counsel emphasizes the fact that in its operation the act of 1907 would break the uniformity of the common school system. To summarize, a common school, within the meaning of our constitution, is one that is common to all children of proper age and capacity, free, and subject to and under the control of the qualified voters of the school district. The complete control of the schools is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select qualified teachers, with powers to discharge them if they are incompetent. Under the system proposed, instead of the voters employing a teacher with proper vouchers of worthiness, they are made recruiting officers to meet a draft for material that the apprentice may be employed.

A normal school has been defined as a school,

"not intended for the education of the children of the inhabitants of the districts where they are located, but for the training of teachers for all the common schools. They are not open to all, but only to such as may be selected at times and in a manner to be prescribed by the superintendent of public instruction. . . . Applicants for admission are required to possess certain qualifications, which must be tested by preliminary examinations, and on the completion of their studies the pupils are to receive diplomas, which shall be evidence of their qualification to teach in common schools; but they are under no obligation to become teachers, and there is nothing to prevent their engaging in other pursuits." *Gordon v. Cornes*, 47 N. Y. 608.

Nor can the legislature by any contrivance, designation, or definition, make a common school a normal school, or a normal school a common school, within the meaning of the constitution.

"To say that the legislature can determine what institutions shall receive the proceeds of the school fund; and that whatever they determine to be entitled thereto, becomes *ipso facto* a common school, is begging the whole question, and

annulling the constitutional restriction." *People v. Board of Education*, 13 Barb. 400.

Admitting, for the sake of argument, that the act would result in benefit to the schools as a complete system, the benefit would be only incidental. The main purpose is to benefit the normal pupil, and would result in a diversion of the fund from the exclusive use proposed in the constitution. That the common school and the normal school are distinct is further made certain by reference to the enabling act creating this state. The people have spoken this difference in the constitution, and the legislature has maintained it in the code of public instruction. To take from the one and give to the other by indirect methods that which was designed for a special purpose would defeat the whole scheme of the law and open a way for the ultimate transposition of funds held under a most sacred trust. Courts have been zealous in protecting the money set apart for the maintenance of the free schools of the country. They have turned a deaf ear to every enticement and frowned upon every attempt, however subtle, to evade the constitution. Promised benefit and greater gain have been alike urged as reasons, but without avail. They have endeavored to say in unmistakable terms that the common school fund is just what it purports to be, a fund to be used for the sole purpose of supporting the graded schools of the commonwealth under the sanction of fixed and uniform laws. It follows that all experiments in education must be indulged, if at all, at the expense of the general fund. An attempt to divert a part of the common school fund to the education of children in certain orphanages was met by the supreme court of New York with the suggestion that, if it were accomplished, the legislature "might by a simple enactment, convert all our colleges and academies and all our seminaries into common schools. This cannot be tolerated." *People v. Board, supra.* The supreme court of Virginia, in defining the extent of legislative authority over these funds, said:

"We think the constitution has dedicated this fund to the public free schools of the state, and intrenched behind its bulwarks, it is beyond the reach of the legislature for any other purposes whatever." *State Female Normal School v. The Auditors*, 79 Va. 233.

The supreme court of Kentucky, in several cases, has refused to countenance any diversion of the moneys set apart for the common schools, meeting a positive showing of economy to the public school system with the following:

"The position that the school building is not sufficient in dimensions to accommodate all the children, and for that reason the legislature had the power to divide the fund, cannot be sustained. If not sufficient, those in charge of the common school should make it so, and to allow the legislative department of the government to divide the fund in such a mode, when, in the opinion of those interested, the school buildings were insufficient, would be subversive of the whole school system. If a case could exist where such legislative action would be sanctioned, it is found in the case before us; but, when ample remedies are afforded by the law regulating common schools to prevent such results as is now attempted to justify this character of legislation, there is no reason for establishing a precedent that must, if followed, destroy the very existence of common schools." *Underwood v. Wood*, 93 Ky. 177, 19 S. W. 405, 15 L. R. A. 825.

And the same court, in expressing its unwillingness to conjure an excuse for such legislation, said:

"If the General Assembly may appropriate the revenues of the school fund for any purpose which cannot be clearly shown not to be in aid of common schools in any sense or in any degree, the whole fund may be dissipated and lost to the children of the state whenever the legislature so wills it." *Collins v. Henderson*, 74 Ky. 74.

Other cases having a direct bearing on the issue are *Hall's Free School Trustees v. Horne*, 80 Va. 470; *Halbert v. Sparks*, 72 Ky. 259.

It is not that the legislature cannot make provision for the support of a model training school, but in its attempt to do so, it has made provision for it out of the wrong fund. This

conclusion makes it unnecessary to discuss the other questions raised by counsel for respondent as to the sufficiency of the title of the act.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

[No. 7778. Decided January 22, 1909.]

L. C. RICHARDSON, *Respondent*, v. M. C. COOPER, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—WAIVER OF DEMURRER. Error cannot be assigned upon sustaining a demurrer to an answer, where defendant amended the answer setting up the same defense and introduced evidence in support of the same.

Appeal from a judgment of the superior court for Stevens county, Chapman, J., entered November 23, 1907, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on contract. Affirmed.

Slater & Allen, for appellant.

W. H. Jackson, for respondent.

PER CURIAM.—This is an action upon two promissory notes which the plaintiff, L. C. Richardson, alleged were executed and delivered by the defendant, M. C. Cooper, to the Miners' Supply Company, a corporation, and by it assigned to plaintiff. The defendant denied plaintiff's title to the notes, alleged that the assignment was not authorized by the corporation, and pleaded an affirmative defense, the substance of which was that the notes were executed and delivered by him to the Miners' Supply Company for the accommodation of the plaintiff, who was secretary of the corporation, and that plaintiff agreed to protect the defendant from liability. To this affirmative defense the trial court sustained a demurrer. On

[1]Reported in 99 Pac. 577.

the trial findings of fact and conclusions of law were made and entered in favor of plaintiff, upon which judgment was entered. The defendant has appealed.

The appellant's first contention is that the trial court erred in sustaining the respondent's demurrer to his affirmative answer. It is not necessary for us to pass upon this assignment, as on the trial the defendant was permitted to make an amendment to his answer which substantially tendered the same defense. He was also permitted to introduce evidence in support thereof, which evidence was considered by the trial court. Upon this record we hold that the appellant has been in no way prejudiced by the order sustaining the demurrer.

The controlling question presented by the remaining assignments of error is based upon the appellant's contention that the findings of fact are not sustained by the evidence. It will serve no good purpose to state these findings in detail. The assignments made present issues of fact only. We have carefully examined all the evidence and conclude that the findings are fully within the issues raised by the pleadings as amended on the trial, that they are sustained by the evidence, which was conflicting, and that the proper judgment has been entered thereon.

The judgment is affirmed.

[No. 7313. Decided January 25, 1909.]

F. M. Brown, Junior, *et al.*, *Appellants*, v. L. B. Wisner, *Respondent*.[1]

Brokers—Action for Commissions — Pleadings — Issues and Proof—General Denial. In an action to recover a broker's commissions on an alleged contract of sale, the defendant may, under a general denial, offer evidence to show that the contract actually made was one other than that pleaded in the complaint.

Evidence—Parol Evidence to Vary Writing—Brokers — Contract or Option. In an action to recover a broker's commissions, oral evidence is admissible to show that a written contract of sale for $92,000 on which but $100 was paid was intended by the parties as an option only, since the rule excluding oral evidence to vary the terms of a writing does not apply except as between the parties to the contract.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 7, 1907, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

Edward Judd and *Keenan & Hardinger*, for appellants.

J. J. McCafferty and *James A. Haight*, for respondent.

Crow, J.—This action was commenced by F. M. Brown, Jr., and R. H. Brown, copartners, against Mrs. L. B. Wisner, to recover a broker's commission for the sale of personal property. A jury trial resulted in a verdict for the defendant, and from the final judgment entered thereon, the plaintiffs have appealed.

The evidence shows that the appellants were employed by the respondent, by written contract, to sell an unexpired lease on the Stander hotel in the city of Seattle, together with the furniture, supplies, hotel business, and good will; that they introduced to respondent, one F. J. Richards, as a prospective purchaser; that negotiations were conducted with the result

[1]Reported in 99 Pac. 581.

that, on the evening of September 26, 1906, the appellant F. M. Brown, Jr., the respondent, L. B. Wisner, F. J. Richards, and an attorney who officed with appellants, met in their office; that the attorney, whose presence had been requested by the appellants, prepared a written contract which stated that L. B. Wisner, the party of the first part, sold to F. J. Richards, the party of the second part, the lease with about nine years yet to run, the furniture, the hotel business, and the good will, for which Richards agreed to pay $91,200, as follows:

"One hundred dollars, upon the signing of this agreement, one thousand dollars 20 days after the date of this contract, fifteen thousand dollars within forty days at the time the possession and title to said property is to be transferred to second party by first party, thirty-five thousand dollars to be paid in monthly installments of two thousand dollars each, and the first of said installments to be due and payable one month after the delivery of possession to second party, and $2,000 to be due and payable each 30 days thereafter until the full amount of $35,000 has been paid, said above deferred payments to draw interest at 8 per cent from delivery of possession of said above described property, until fully paid. Said second party is also to pay to first party the sum of four hundred dollars per month for the unexpired portion of the lease of said hotel building now held by first party, the first payment of $400 to be made one month after the delivery of possession of said property by first party to second party, and $400 to be paid each month thereafter during the continuance of said lease, said payments of $400 to be without interest."

The written agreement, after other stipulations not material to this opinion, further provided:

"Time is of the essence of this contract and in case said second party should fail to make payment of the sum of $1,000 and $15,000 at the times herein specified, then any payments made by said second party shall be forfeited to the party of the first part and any and all rights under this contract shall be null and void at the option of the party of the first part."

It was further shown that the written agreement was executed and delivered, that Richards paid respondent $100 cash, that he immediately left for his home in Lincoln, Nebraska, that the $1,000 payment was not made when due, and that the matter of completing the sale and transfer was then dropped by both parties.

The appellants, claiming that the written contract evidenced a completed sale, commenced this action on January 3, 1907, to recover the sum of $2,530, as commission for their services. On the trial the respondent introduced her own evidence and that of Richards, to the effect that neither of them intended or understood the written agreement to be an absolute contract of sale; that they did not intend to make any contract other than one for an option; that by the payment of $100 Richards obtained such option for twenty days, the same to be extended for twenty additional days upon the payment of $1,000, and that the sale was not to become absolute until the third payment of $15,000, at which time the title was to be transferred. To the introduction of this evidence the appellants objected, contending that the written instrument was a valid contract for an absolute sale which could be enforced in an action for specific performance, or in an action at law for damages, and that the parol evidence offered was inadmissible as it tended to vary the terms of such written agreement.

The appellants' controlling assignment of error is based upon the admission of this evidence. If the ruling of the trial court be upheld in this regard, there can then be no merit in any of the other assignments of error presented, the admission of this evidence being the vital question in the case. Our conclusion is that the evidence was properly admitted.

The appellants in their complaint allege:

"That on or about the 26th day of September, 1906, the plaintiffs procured and induced one F. J. Richards to purchase said above described hotel furniture, fixtures, supplies, equipment, lease and good will for the agreed price of $91,200 and

that said contract was reduced to writing and signed by the said defendant and the said F. J. Richards."

The answer consisted of denials only, and the appellants now contend that, having failed to plead any affirmative defense, the respondent was not entitled to show that the contract actually made and entered into by the parties was simply an option. The denials of the answer put in issue the affirmative allegations of the complaint. It is a well-recognized rule of pleading and proof that under a general denial a defendant may offer evidence to show that the contract actually made was another than that pleaded in the complaint. *Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472, 7 Pac. 882, 886; *Armstrong v. Musser Lumber & Mfg. Co.*, 43 Wash. 584, 86 Pac. 944. The written instrument which the appellants offered in evidence tended to show that the contract actually made and intended by Mrs. Wisner and Mr. Richards was the one pleaded by appellants. If, however, Mrs. Wisner and Richards intended to and did in fact mutually agree upon an option, the respondent was entitled to show that fact in support of her denial of the contract pleaded in the complaint.

The appellants further contend that the parol evidence was not admissible to vary the terms of the written contract, which they insist was not ambiguous, but upon its face disclosed an absolute sale. The evidence shows that the only attorney who was present at any time during the negotiations was the one who occupied the same office with the appellants; that he was present at their request; that he represented neither the respondent, Mrs. Wisner, nor the proposed vendee, Mr. Richards; that neither of them was at any time so represented; that he drew the written contract from memoranda furnished by Mr. Richards; that Mrs. Wisner was not familiar with legal instruments; that Richards was a nonresident of the state of Washington, who contemplated going into the hotel business in the city of Seattle; that Mrs. Wisner and Mr. Richards mutually understood that she was selling and that he was

purchasing an option; that the $100 cash payment made at the time constituted no part of the $91,200 proposed purchase price, which was to be paid in installments in the event that Richards afterwards determined to take the property and complete his purchase; that he failed to make any further payments, being disappointed in some of his financial plans; that thereupon the optionor and the optionee mutually regarded the transaction as at an end; that they were then without further liability the one to the other; and that, if the written instrument did not itself amount to a mere option, the attorney who drew it did not correctly state the actual intended and mutual agreement of the parties. If these statements made by Mrs. Wisner and Mr. Richards, and in which they agree, were true, no completed sale was made. Their evidence was competent as tending to prove that fact. The rule of excluding parol evidence offered to vary the terms of a written contract applies only to controversies between parties to the contract or their successors in interest. 17 Cyc. 749, 750, and cases cited; *Carmack v. Drum*, 32 Wash. 236, 73 Pac. 377, 785.

The question whether the respondent and Richards mutually agreed upon an actual sale as indicated by the written contract, or upon an option only as they both testified, was submitted to the jury by proper instructions which correctly stated the law. The verdict returned necessarily shows that the jury found the agreement actually made was for an option. This being true, no sale was made or completed and the appellants cannot recover.

The principles above discussed we regard as resolving all issues of this case in favor of the respondent. The trial court committed no prejudicial error. The judgment is affirmed.

Rudkin, C. J., Mount, Fullerton, and Dunbar, JJ., concur.

Chadwick and Gose, JJ., took no part.

[No. 7726. Decided February 1, 1909.]

WILLIAM EVERT, *Appellant*, v. N. D. TOWER *et al.*, *Respondents*.[1]

LIMITATION OF ACTIONS — FRAUD — CONCEALING MISTAKE—PLEADING. An action is not one for relief upon the ground of fraud, which would accrue only upon discovery of the fraud, where it is alleged that the plaintiffs sold defendants a car load of eggs, and attached a draft for the price according to the custom of merchants, which by mistake was $1,200 short, and that defendants, after consulting together, decided to conceal knowledge of the mistake, and that paying the draft and ceasing business transactions with plaintiff constituted a fraud on the plaintiffs, which they did not discover until three years subsequent to the sale; and the use of the word "fraud" in the complaint does not enlarge the meaning of the facts pleaded.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 8, 1908, dismissing an action on contract, upon sustaining a demurrer to the complaint. Affirmed.

John E. Ryan and *C. K. Poe*, for appellant.

Herr, Bayley & Wilson, for respondents.

GOSE, J.—This is an appeal from a judgment by the superior court of King county, sustaining a demurrer to the second amended complaint, on the ground that the action had not been commenced within the time limited by law. It is alleged in the complaint that, on or about June 15, 1904, the appellant sold to respondent, Bell Tower Company, a car load of eggs, at the agreed price of $1,665, and that the eggs were shipped to respondent with a draft attached for $456. It is further pleaded that, at the time of such shipment, it was the custom among merchants to attach a draft to the bill of lading, drawn against the purchaser for the purchase price of the article sold; that through mistake the ap-

[1]Reported in 99 Pac. 580.

pellant drew for $1,200 less than the purchase price. The complaint also states that the respondents honored the draft with knowledge of the error in amount, and after discussing whether they should notify the appellant of such mistake, or "by concealing the same from the plaintiff they should attempt to keep from him the knowledge thereof; that after so advising, said defendants did at that time conclude upon the latter course." The complaint further states: "That the paying of said draft by these defendants, together with the cessation of all business transactions with the plaintiff, constituted an act of fraud by the defendants on the plaintiff." The appellant did not discover his mistake until the 21st day of August, 1907, and more than three years subsequent to the sale. He thereupon made a demand for the balance due. Payment was refused.

Appellant urges that the facts stated bring him within the provisions of Bal. Code, § 4800, subd. 4 (P. C. § 285), which provides that, in an action for relief upon the ground of fraud, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

The sufficiency of the complaint is the only question presented on appeal. Did the mere failure of the debtor to notify the creditor of his mistake operate as a fraud upon the latter, so as to bring him within the protection of the statute? It is true the appellant charges the omission to be a fraud against him. However, the use of the word "fraud" does not enlarge the meaning of the facts pleaded. The mistake was made by the appellant. The failure of the respondents to notify him of such mistake does not constitute legal fraud. The law devolves no such obligation upon the debtor.

The judgment will be affirmed.

Rudkin, C. J., Chadwick, Crow, Mount, Fullerton, and Dunbar, JJ., concur.

[No. 7581. Decided February 1, 1909.]

C. R. Collins, *Respondent*, v. Morris Gross *et al.*, *Appellants*.[1]

Mortgages—Foreclosure—Receivers—Appointment. A receiver may be appointed pending foreclosure of a real estate mortgage, where it appears that the mortgagors had abandoned the property and left for foreign lands and that a receiver is necessary to care for and protect the property and rent the same during the pendency of the action.

Same—Statutes—Repeal—Implied Repeal. Bal. Code, § 5516, repealing Bal. Code, § 5456 in so far as it authorizes the appointment of a receiver for mortgaged real property because of insufficiency of the security, does not repeal by implication other provisions for the appointment of a receiver to save waste.

Appeal from an order of the superior court for King county, Morris, J., entered May 6, 1908, refusing to vacate the appointment of a receiver, after a hearing before the court upon affidavits, etc. Affirmed.

Blaine, Tucker & Hyland, for appellants.

H. R. Clise and *A. R. Bravender*, for respondent.

Crow, J.—This action was commenced on February 1, 1908, by C. R. Collins, against Morris Gross and Sophie Gross, his wife, to foreclose a mortgage on real estate in the city of Seattle. The plaintiff alleged, that on January 31, 1907, the defendants had executed and delivered to him their note for $13,000, payable one year after date; that to secure its payment they also executed and delivered to him their mortgage deed, the same being a purchase money mortgage, subject to a former mortgage for $27,000 which the defendants had assumed and agreed to pay; that, long prior to the commencement of this action, the defendants had departed from the city of Seattle; that their whereabouts was unknown; that they had abandoned the mortgaged real estate,

[1]Reported in 99 Pac. 573.

which was improved with a frame building suitable for apartment house purposes; that they were giving the property no care or attention; that they had failed to pay past due interest on the prior mortgage, and that unless some suitable person was appointed as a receiver to care for and preserve the property, the rentals then due and thereafter to become due would be lost, and the premises would be materially impaired and injured. Service was made by publication, and upon plaintiff's motion, a receiver was appointed to take charge of and rent the mortgaged property. On April 24, 1908, the defendants, appearing by attorney, moved the court to vacate the appointment and remove the receiver. From an order denying this motion, the defendants have appealed.

The appellants assert that the receiver could only have been appointed under the authority of Bal. Code, § 5456, and contend that said section in so far as it would authorize a receiver herein has been repealed by implication, citing *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 717, and *Balfour-Guthrie Inv. Co. v. Geiger*, 20 Wash. 579, 56 Pac. 370. The motion was heard upon affidavits and other documentary evidence, from which it appears, that the property was improved; that it had been rented as an apartment house; that the appellants left Seattle some time during the month of September, 1907; that their location was thereafter unknown; that they were supposed to be in France or some other foreign country; that one F. W. West, now the receiver, had been their rental agent in charge of the property; that he had not heard from them directly or indirectly at any time after September, 1907; that on or about November 20, 1907, one F. M. Webb, of Los Angeles, California, called upon West at Seattle, Washington, exhibited to him a power of attorney from the defendant Morris Gross, authorizing him to sell certain furniture in the apartment house, and to lease the premises; that Webb thereupon authorized West to sell the furniture and make a lease; that pursuant to such authorization West did lease the property to a tenant for two years, at $175 per

month; that about January 9, 1908, West wrote to the defendant Gross in the care of F. M. Webb, at Los Angeles, California, in relation to certain unpaid taxes and other expenses, and that thereafter, on January 13, 1908, West received from Webb the following letter:

"Mr. F. W. West, Seattle, Wash.

"Dear Sir:—Received the communication from you for Gross as to taxes etc. Mr. Gross has left Los Angeles and the last I heard of him he had bought a ticket for Paris, France, and his money is transferred there. He intends to repudiate all his obligations, and as far as the property is concerned he will do nothing further with it. I would be glad if you would notify Mr. Furth of this. He expects the mortgages to be foreclosed and that is about the best thing that can be done under the circumstances. Very truly, F. M. Webb."

The record fails to show that, at any time prior to the hearing of appellants' motion, they had been heard from by any of the parties connected with, or interested in, the property, or in this action, after September, 1907, except as above stated. On the last day preceding default, appellants appeared by attorney, but so far as the record shows they have only made dilatory motions or taken other steps to delay foreclosure, without answering the complaint or in any manner pleading to its merits. We do not deem it necessary to fully state the showing made by the affidavits, our conclusion therefrom being that the appellants had actually abandoned the property in such a manner as to require the appointment of a receiver for its protection and care, and for the preservation of respondent's rights.

In *Norfor v. Busby*, and *Balfour-Guthrie Inv. Co. v. Geiger*, *supra*, the cases upon which the appellants rely, this court in substance held that the act of 1854, now Bal. Code, §5456 (P. C. § 575), in as far as it provides that a receiver may be appointed in an action for the foreclosure of a mortgage prior to judgment and sale, whenever the property is insufficient to discharge the debt, had been re-

pealed by implication by the later act of 1869, Bal. Code, § 5516 (P. C. § 1152), which provides that a mortgage shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. The cases referred to did not hold any other provision of the statute of 1854 to have been repealed by implication. In the later case of *Euphrat v. Morrison*, 39 Wash. 311, 81 Pac. 695, this court, distinguishing those cases, said:

"Provisions of the statute which are not repealed are to the effect that a receiver may be appointed in all actions, where it is shown that the property, fund, or rents and profits in controversy are in danger of being lost, removed, or materially injured in an action by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed, or materially injured and in such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties."

A sufficient showing of appellants' abandonment of the property has been made by the respondent to authorize the appointment of a receiver to care for, protect, and rent the property during the pendency of the foreclosure proceedings. The only showing made by appellants consists of one affidavit of a third party filed upon their behalf, which we think contains no statement of fact sufficient to warrant a discharge of the receiver.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, and MOUNT, JJ., concur.

CHADWICK and GOSE, JJ., took no part.

[No. 7465. Decided February 1, 1900.]

WILLIAM AUMILLER *et al.*, *Appellants*, v. L. A. DASH *et al.*, *Respondents*.[1]

DEEDS—CONDITIONS—BREACH. Conditions subsequent in a deed do not affect the estate until they are broken.

SAME—ESTATES CONVEYED—DETERMINABLE FEE. A deed conveying a determinable fee may embrace a fee upon condition, entitling the tenant, for the time being, to all the rights of a fee simple.

DEEDS—ESTATE GRANTED—RESERVATIONS—CONSTRUCTION. A deed granting the undivided one-half of a strip of land one rod wide, so long as the grantees shall use the same as a private way and for an irrigation ditch, and further granting the right to use the other undivided one-half of the strip for the same purposes, reserving the right in the grantors to make common use of the strip for all purposes connected with the adjoining land, conveys a determinable fee simple title to an undivided one-half of the strip, and precludes the grantors, during the life of the grantee's estate, from dedicating the strip to the public as a public highway.

Appeal from a judgment of the superior court for Yakima county, Kauffman, J., entered November 26, 1907, upon findings in favor of the defendants, after a trial before the court without a jury, dismissing an action for an injunction. Reversed.

Cull, Luse & Davis, for appellants.

Wende, Taylor & Delle, for respondents.

DUNBAR, J.—On the 11th day of August, 1899, the Ontario Land Company, a corporation, executed and delivered unto the appellant William Aumiller a certain deed, that part of which material to the determination of this case is as follows:

"An undivided one half of a strip of land one rod wide, off the west side of the northeast quarter of the northwest quarter and off the west side of the north half of the south-

[1]Reported in 99 Pac. 583.

east quarter of the northwest quarter of section twenty-five, township thirteen, north, of range eighteen east, in Yakima county, Washington, so long as said party of the second part, his heirs and assigns and their agents and servants, and the tenants and occupiers for the time being of the north half of the southwest quarter of the northwest quarter of said section twenty-five, shall use said strip of land for a private way to and from said twenty acres, and for carrying to said twenty acres water for the purpose of irrigation, and no longer, and further granting unto said heirs and assigns during the like period and no longer, the right to use the undivided one-half of said strip not conveyed to second party, as a like private way, and as a right-of-way for an irrigation ditch, for said twenty acres, excepting and reserving unto said grantor its successors and assigns the full and free right and privilege at all times hereafter in common with all other persons who may have any rights hereunder the right to use said strip of land at all times and for all purposes connected with the use of the east half of the northeast quarter and the northeast quarter of the southwest quarter of said section 25, whether as a private way or as a right-of-way for an irrigation ditch or both or otherwise."

Afterwards the Ontario Land Company caused to be platted the said northeast quarter of the northwest quarter of said section 25, being a part of the land referred to in the said deed, into what is known as the "Ontario Land Company's Garden Lots adjoining North Yakima, Washington." Afterwards, through mesne conveyances, the respondent L. A. Dash acquired title from the said Ontario Land Company to lot 3 of its said Garden Lots. Afterwards, together with one Rasch, who was the owner of lot 5 of said Garden Lots, he caused the same to be platted into what is known as "Victoria Addition," being a subdivision of lots 3 and 5 of the Ontario Land Company's Garden Lots, and dedicated to the public the streets and alleys, including the strip of land one rod wide described in the deed from the Ontario Land Company to the appellant Aumiller. The complaint shows that the strip of land since its sale to appellants has been used in accordance with the conditions of the deed, and that, after

it had been dedicated to the public by the respondents, the respondents tore down the fences which appellants had erected to bound their right of way, and dedicated the strip as aforesaid as a public road, and that said strip of land is being used by the public as a public road to the interference with the rights of the appellants, and asks that the respondents be enjoined from interfering with appellants' rights, or destroying or tearing down their fences, and that the dedication of said land be annulled. The respondents admitted the deed above set forth, but claimed title through the Ontario Land Company, and claimed that the appellants had no interest in the land except as an easement for a right of way. The court found that the appellants have no interest in said land except the right of way, and that said right of way was not interfered with by the use of the land by the respondents: and adjudicated that the appellants had no interest in the land except an easement, that the respondents owned the land, and dismissed the suit as to the appellants.

The case here turns upon the construction of the deed from the Ontario Land Company to the appellant William Aumiller. It will be seen at a glance that the construction of this deed is a difficult task. It seems to be *sui generis*, and the ordinary canons of construction are not applicable. So that about the only thing the court can do is to carefully examine this deed and determine as best it can what was intended by the grantor to be conveyed. So examining it, we think the instrument must be construed to be a deed of the land first described, subject to the time and conditions mentioned, and these being conditions subsequent could not affect the estate conveyed until the conditions had been broken. *Spaulding v. Hallenbeck*, 39 Barb. 79, 88; *Mouat v. Seattle, Lake Shore & E. R. Co.*, 16 Wash. 84, 47 Pac. 233.

This deed conveys a determinable or qualified fee, and such a fee may embrace what is properly a fee upon condition. In discussing determinable fees, Mr. Washburn, in his work on Real Property (6th ed.), at page 80, says:

"So long as the estate in fee remains, the owner in possession has all the rights in respect to it which he would have if tenant in fee simple,"

adding certain exceptions which are foreign to this case. In *State v. Crown*, 27 N. J. L. 13, it was held that

"Where, by the terms of a conveyance to a corporation, the grantees are restricted in the use of the estate conveyed, they are nevertheless considered as owners in fee of the land while their estate continues; and although they may have no right to use the land for any other purpose than that expressed in the grant, yet they have the right to prevent any other person from using either the land, or the incidents to it, for any purpose whatever;"

citing 1 Inst. 1, b. 27 a, to the effect that by the terms of the conveyance the grantees take a qualified fee, liable to be defeated whenever they cease to use the land for the purpose specified in the grant; citing, also, Plowden, 857, where it is said:

"Yet while the estate continues, and until the qualification upon which it is limited is at an end, the grantee has the same rights and privileges over his estate as if it were a fee simple."

In *Coburn v. Coxeter*, 51 N. H. 158, it was held that:

"A conveyance of a strip of land itself, in explicit terms, with a restriction that it shall be used only for a road, is nevertheless a grant of the fee, and not of a mere easement."

So far as we are able to ascertain, this is the universal authority.

It is evident that the grantor intended to convey more by the first grant than by the second; otherwise there would have been no occasion for the second grant. The first grant conveys absolutely for certain purposes without a reservation of rights by the grantor, but in the second the grantor reserves to himself certain rights. But whatever construction may be placed upon the deed, the private right which was conveyed was property of the grantee which he had a right to use in any way he chose within the limitations prescribed

by the deed, and it was for him to determine whether the right of the public to his private right of way and his water ditch facilities would be an impairment of his rights. The respondents, therefore, had no right to dedicate this strip of land to a public use, or to interfere with appellants' use of said land in any way.

The respondents largely rely upon the case of *Reichenbach v. Washington Short Line R. Co.*, 10 Wash. 357, 38 Pac. 1126; but we think the cases are not at all parallel. There the deed considered conveyed in plainest language merely a right of way, and it was a right of way for a railroad purpose. The grantee was a railroad company, and this fact, coupled with the language of the grant, made it conclusive that the grantee intended only to convey a right of way. There was no intention in that case to decide that there could be no such thing as an estate upon condition or determinable fee. Such estates have always been recognized and must be maintained by the courts. We think the court placed a misconstruction upon the deed; but that, in any event, under the conditions expressed in the deed, the respondents had no right to in any way interfere with the estate of the appellants in the strip of land aforesaid, or to burden it with a servitude for the benefit of the public.

The judgment will be reversed, with instructions to grant the relief prayed for in the complaint.

RUDKIN, C. J., CROW, MOUNT, and FULLERTON, JJ., concur.

CHADWICK and GOSE, JJ., took no part.

[No. 7408. Decided February 1, 1909.]

FRANK L. CRAMPTON *et al.*, *Appellants*, v. McLAUGHLIN REALTY COMPANY *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—RESCISSION BY VENDEE—COVENANTS—MUTUALITY—BREACH—REMEDY. Covenants in a contract for the sale of land relating to building restrictions and the making of street improvements by the grantors, are independent of the covenants to convey and pay the purchase price, and the grantee's remedy for a breach is an action for damages, and not rescission, where performance, and the time therefor, on one side was quite independent of performance on the other, and a breach goes only to part of the consideration and can be compensated in damages.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 28, 1908, in favor of the defendants, upon their motion for judgment on the pleadings. Affirmed.

Million & Houser, for appellants.

R. F. Booth and *Peters & Powell*, for respondents.

RUDKIN, C. J.—On the 22d day of October, 1906, the plaintiffs and the defendants entered into a contract whereby the defendants agreed to convey to the plaintiffs certain real property therein described, upon the payment of the sum of $2,400, which the plaintiffs agreed to pay as follows: $400 on execution of contract, $200 on January 22, 1907, $200 on April 22, 1907, $200 on July 22, 1907, $200 on October 22, 1907, $200 on January 22, 1908, $200 on April 22, 1908, $200 on July 22, 1908, and $600 on October 22, 1908, with interest on deferred payments at the rate of six per cent per annum. It was further agreed that the purchasers should pay all taxes and assessments levied or assessed against the property, and that the contract should be forfeited at the election of the vendors for failure to make any payment when due. In addition to the usual covenants to convey and to pay

[1]Reported in 99 Pac. 586.

the purchase price, the contract contained the following covenants on the part of the vendors and purchasers:

"This sale is made subject to the following building restrictions: Nothing but a single detached residence, and the necessary outhouses, costing not less than Three Thousand Dollars ($3,000) shall be built on any one lot described in this contract; subject also to the vendors rights to establish grades of streets, alleys, and sidewalks and to grade the surface of the lots to conform to said grades, when desirable; to make any alterations in the plat before the same is filed; for a period of six months from the date hereof to remove any and all brush, stumps or trees from said lot deemed by them to be necessary for the safety or benefit of these premises. No old buildings shall be moved thereon. No building shall be set nearer the street or shore line of said lot than the building line established on the plat. The grantee herein agrees not to erect or to suffer to be erected or maintained on said premises any flat, apartment, store, business or manufacturing building or to allow any building erected thereon in whole or in part, to be used for business or manufacturing purposes.

"It is further agreed that the purchasers of water front lots shall not use the water front thereof for any commercial purposes nor shall they drive any pile or piles, or construct wharves or docks in front thereof, except as may be necessary for one launch house and approaches thereto, the same to be attractively built and painted and to be used for the private use of the owner of these premises. Said first parties also reserve the right to traverse the said premises, should it become necessary, with water mains or sewers.

"In the event that the state of Washington shall offer for sale the shore lands lying in front of the property described herein before the title passes to the purchaser herein named, the parties of the first part shall have the right to purchase said lands from said state of Washington and upon the passing of title to said lot, said first parties shall quitclaim to said second party said shore lands so purchased, upon the payment to them of the amount actually paid said state with interest at seven per cent per annum.

"Said first parties agree that they will, free of cost to said second party, put in the necessary cement sidewalks, sewer

and water mains and pave the abutting street, within one year from the date hereof."

The plaintiffs made the initial payment of $400 at the execution of the contract, and paid the installments of $200 each, falling due on the 22d day of January, 1907, the 22d day of April, 1907, and the 22d day of July, 1907, respectively. On the 23d day of October, 1907, the plaintiffs elected to rescind the contract for failure on the part of the defendants to put in the cement sidewalks, sewer and water mains, and pave the abutting streets within one year from the date of the contract, as agreed, and so notified the defendants. This action was thereafter instituted to recover the $1,000 paid under the contract, with legal interest from the dates of the several payments. The complaint alleged the execution of the contract, the payment of the installment due July 22, 1907, and all prior installments, that the plaintiffs had in all respects fully complied with the terms of the contract on their part, the failure of the defendants to put in the cement sidewalks, sewer and water mains, or pave the abutting streets within the year, the election of the plaintiffs to declare a forfeiture, and prayed judgment in the sum of $1,000, with interest and the cost of suit.

The answer set forth the contract *in haec verba* and admitted that the defendants "Had not completely paved the abutting street on the 22d day of October, 1907, but as a matter of fact that they had put in sidewalks, water mains, gutters and curbs, and had laid the foundation for the paving of the street, and had completed seventy-five per cent in cost and in value of the improvements so to be put in, and have now completed the sewer system, and have completed the entire improvements as speedily as possible." Upon the issues thus presented, both parties moved for judgment on the pleadings. The motion of the plaintiffs was denied, and that of the defendants granted, and from the judgment thus given the plaintiffs have appealed.

The respondents contend that the appellants were in default for failure to pay or tender the installment due October 22, 1907, and that being in default they could not claim a forfeiture for a like default on the part of their vendors. The appellants, on the other hand, contend that the allegation that they had fully complied with all the terms and conditions of the contract on their part, showed that they were not in default, and that it was not incumbent upon them to pay or tender the installment due on October 22, 1907, because it appeared that it was without the power of the respondents to perform. Regardless of the merits of these respective contentions, we think there are other reasons why the judgment should be affirmed. The numerous covenants contained in this contract, aside from the covenant to convey and the covenant to pay the purchase price, are wholly independent of each other, and the only remedy for a breach of such covenants is an action for damages. It is sometimes difficult to determine whether covenants are dependent or independent, but we think the covenants contained in this contract in relation to building restrictions, improvements, etc., are clearly of the latter class.

"If there is no connection in the matter of the promises, and the performance on the one side is quite independent of the performance on the other, the promises are in general independent and not conditional. Where, by the terms of the contract, the time to perform the covenant on the one side is to arrive, or may arrive, before the time for the performance of the covenant on the other side, the former is not dependent on the latter." 9 Cyc. 642.

In *Hunt v. Tibbetts*, 70 Me. 221, the court said:

"It is obvious that two of the matters which courts have been wont to deem important in determining whether the stipulations of parties are independent, or whether performance by one party is a condition precedent to the maintenance of his action for a breach on the part of the other, to wit: the order of time in which performance is to take place, and the fact that on each side the promises go only to a part of the

consideration and a breach may be compensated in damages or the injured party otherwise have a perfect remedy, concur in the present case to incline us to regard their mutual promises as independent, and to hold that each party should have his proper remedy for a breach by the other."

In *Turner v. Mellier*, 59 Mo. 526, the court said:

"The general rule is, that where covenants on the part of the different parties are to be performed at different times, they will be considered to be independent covenants, and a breach of one can be sued for without alleging or proving the performance of the other. Another rule is, that where the covenant goes only to a part of the consideration of both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and consequently an action may be maintained for a breach of such covenant on the part of the defendant without averring performance of other covenants on the part of the plaintiff."

So in this case, the covenant to make improvements goes only to a part of the consideration, and the fact that the date for completing the improvements and the date of payment of one of the installments of the purchase price fell on the same day was a mere coincidence. In *American Emigrant Co. v. County of Adams*, 100 U. S. 61, 25 L. Ed. 563, the Emigrant Company purchased certain lands from the county and agreed, as a part of the consideration, to drain the lands and bring in settlers. In an action to rescind the contract for breach of this and other covenants, the court said:

"The allegations of the bill to the effect that the Emigrant Company has not fulfilled its engagements with respect to the drainage and settlement of the land, rest in covenant merely, and afford no ground for avoiding the contract. Where covenants are mutual and dependent, the failure of one party to perform absolves the other and authorizes him to rescind the contract. But here the contract was largely carried into execution soon after its inception. The engagements of the appellants to introduce settlers and the like were to be performed in the future; and their performance was

not a condition, but, as before stated, rested in covenant. In case of a breach, they would lay the foundation of an action, but nothing more."

See, also, *Tipton v. Feitner*, 20 N. Y. 423; *Front Street etc. R. Co. v. Butler*, 50 Cal. 574. For these reasons we are of opinion that the remedy of the appellants for the breach of the covenant to make improvements was to offset their damages in an action for the purchase price, or prosecute an independent action for the breach of the covenant, and that the breach of such a covenant, of itself, affords no adequate ground for rescission.

The judgment is therefore affirmed.

DUNBAR, CROW, and MOUNT, JJ., concur.

FULLERTON, CHADWICK, and GOSE, JJ., took no part.

[No. 7480. Decided February 1, 1909.]

F. S. THORP *et al.*, *Respondents*, v. SAMUEL V. RAMSEY, *Appellant*.[1]

PLEADING—CERTAINTY—BILL OF PARTICULARS. The denial of a motion to make a complaint more definite and certain is not error when the same result is accomplished by ordering a bill of particulars.

SAME—ATTORNEY AND CLIENT—SERVICES. In an action to recover for services in conducting two suits, the defendant is not entitled to a bill of particulars itemizing the charges for each step taken preparing for trial, but it is sufficient if he is informed that the services were performed in connection with those certain actions.

ATTORNEY AND CLIENT—SERVICES — VALUE — EVIDENCE — COMPETENCY. In an action to recover the reasonable value of services of an attorney in a trial, the files and records in the cause are competent, whether they were sole attorneys in the cause or not.

SAME. In an action by a firm of attorneys to recover for their services, which were intermingled, it is not error to exclude cross-examination of a plaintiff as to the reasonable value of his individual services.

[1]Reported in 99 Pac. 584.

PARTIES—PARTNERSHIP—ACTIONS—SUIT IN FIRM NAME—ATTORNEY AND CLIENT. Where two persons form a copartnership for the practice of the law and the firm is entitled to the emoluments of the firm and each of its members, the firm may maintain an action in the firm name to recover for services of any member.

ATTORNEY AND CLIENT—RELATION—SUBSTITUTION—INSTRUCTIONS. A positive instruction that an attorney's employment is personal and cannot be delegated without the client's consent, and that a client would not be liable for the services of one member of a firm if neither that member or the firm were employed by him, is not nullified by a subsequent instruction that the rule forbidding the delegation of authority has no application to the members of a copartnership.

APPEAL—REVIEW—VERDICT. The verdict of a jury upon a question of attorney's fees will not be disturbed if sustained by competent evidence.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 7, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Austin E. Griffiths (*Paul Shaffrath*, of counsel), for appellant.

L. H. Wheeler, for respondents.

RUDKIN, C. J.—This was an action to recover attorney's fees. The complaint alleged that between the first day of January, 1906, and the first day of June, 1907, the plaintiffs performed services as attorneys for the defendant, at his special instance and request, in attending to matters in his behalf in certain litigation in court, and in consulting with and advising the defendant, and in drawing and engrossing certain papers and documents, which services were of the reasonable value of $2,000, no part of which had been paid, except the sum of $50.

To this complaint the defendant appeared and moved the court: (1) To require the plaintiffs to make their complaint more definite and certain by stating and setting forth therein, when, where, how, and by whom the plaintiffs were requested

to perform the alleged services, and to describe the litigation therein mentioned; and (2) for an order requiring the plaintiffs to furnish the defendant with a bill of particulars of their said claim and demand. The motion to make the complaint more definite and certain was denied, but the demand for a bill of particulars was granted. In obedience to this demand or order, the plaintiffs filed a bill of particulars, containing seventy-three separate items of $25 each, one item of $100, and one item of $1,000, for services performed on divers dates between November 8, 1906, and January 28, 1907, in connection with two certain actions entitled Ramsey v. Wilson and Wilson v. Ramsey.

The defendant next moved to make the bill of particulars more definite and certain by stating the names and number of witnesses consulted, what documents and records were examined and by whom, what documents and how many were prepared by the plaintiffs and at whose instance, the number of affidavits prepared and the names of the different affiants, by specifying the dates when and at whose instance the plaintiffs appeared in court, what the alleged services in court consisted of, and to further itemize the charges of $100 and $1,000 for services rendered in court and on the trial of the actions. This motion was denied, and the defendant answered over. The cause was tried before a jury, resulting in a verdict in favor of the plaintiffs for the sum of $1,500; and from the judgment entered pursuant to this verdict, the present appeal is prosecuted.

The first error assigned is in the refusal of the court to require the respondents to make their complaint and bill of particulars more definite and certain. The appellant certainly had no right to insist upon both of these motions. It would be an idle formality to require the respondents to set forth every detail of their cause of action in their complaint, and then supplement the complaint by a bill of particulars. There was no error, therefore, in the denial of the motion to make the complaint more definite and certain. Nor was

there any error in the denial of the motion directed against the bill of particulars. The respondents attempted the impossible when they attempted to segregate and itemize their claim by making a separate charge for each step taken in the preparation for trial and trial of the actions. The two actions referred to in the bill of particulars were, first, an action by the appellant to quiet his title to a certain forty-acre tract of land near the city of Seattle, and second, an action by the defendant in the last-mentioned action against the appellant herein to recover possession of the same land under the forcible entry and detainer statute. When the respondents informed the appellant that their cause of action was for services performed in connection with these two actions, we think they gave him all the information he was entitled to under any system of pleading. *Moore v. Scharnikow*, 48 Wash. 564, 94 Pac. 117.

It is next contended that the court erred in admitting in evidence the records and files in the two actions referred to. The files and records in a cause are entirely competent and proper for the consideration of the court and jury in an action to recover the reasonable value of services performed by an attorney in such cause; and this, whether the attorney was the sole attorney in the cause or not. Objection is further made to the hypothetical questions propounded to the expert witnesses, but the objection is without merit.

It is next contended that the court erred in sustaining an objection to a question propounded to the respondent Thorp making inquiry as to the reasonable value of his personal or individual services. The services performed by the two respondents were so intermingled that there was no error in this ruling.

The court instructed the jury in effect that if two persons form a copartnership for the practice of the law and the firm is entitled to the emoluments of the firm and each of its constituent members, the firm may maintain an action in the firm name to recover the value of services performed by the

firm or by any of its members. Under such a state of facts, the firm would be the real party in interest, and under our statute might properly maintain the action. It might be the better practice to allege the employment of the member of the firm and the interest of the firm in the emoluments, but no prejudice resulted to the appellant in this case from a failure so to do. There was, therefore, no error in the giving of this instruction, nor in the refusal of the court to give the instruction requested by the appellant setting forth the contrary view. At the request of the appellant the court gave the following instruction:

"The relation of attorney and client is one of a personal nature, and where an attorney is employed in the case the law is that he has no authority, without the consent of his client, to delegate his authority or substitute another attorney in his stead; and in this case I instruct you that if you should find from the evidence in this case that the firm of Thorp & Wheeler was not employed by Ramsey, but that only Thorp was employed by defendant Ramsey, and if you further find that defendant Ramsey had no knowledge that Wheeler was performing or rendering any services for him, then I instruct you that you can allow nothing for any services that may have been performed by Wheeler, if you find any such services were performed by him."

The court afterwards modified this instruction by stating that the rule forbidding the delegation of authority or substitution of attorneys has no application to the members of a copartnership. This modification in no manner changed or nullified the positive instruction that a recovery for services of one member of the firm could not be had where neither the firm nor that member were employed. While the instructions are somewhat involved and conflicting, we cannot say that they were in the least prejudicial to the appellant.

It is lastly contended that the verdict is not sustained by the testimony. Where a question of attorney's fees is submitted to the trial court for decision this court may review its action, but where the question is submitted to a jury their

verdict stands on the same footing as a verdict in any other case and will not be disturbed by this court if sustained by competent testimony. There is such testimony in this record. Other questions are discussed in the brief, but we find them without merit.

Judgment affirmed.

DUNBAR, CROW, MOUNT, and FULLERTON, JJ., concur.

CHADWICK and GOSE, JJ., took no part.

[No. 7551. Decided February 1, 1909.]

T. N. LYNCH *et al.*, *Respondents*, v. SPRAGUE ROLLER MILLS, *Appellant*.[1]

CROPS—OWNERSHIP—POSSESSION. The occupier of land is the owner of all crops harvested during his term of occupancy.

CROPS—VENDOR AND PURCHASER—CONTRACTS—TITLE TO CROPS—CONSTRUCTION. A contract for the sale of land, providing that the principal and interest to become due on the purchase price shall be paid out of the proceeds of the sale of wheat to be raised by the vendees, and that the parties should mutually agree upon the warehouse in which the wheat was to be stored and the time when it was to be sold, does not vest in the vendors any right or title in or to the wheat, the rule of construction for contracts between landlord and tenant applying.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered February 3, 1908, in favor of the plaintiffs by direction of the court, upon discharging the jury, in an action on contract. Reversed.

Wakefield & Witherspoon and *H. M. Stephens*, for appellant.

Samuel R. Stern, for respondents.

RUDKIN, C. J.—On the 1st day of October, 1904, the plaintiffs, as parties of the first part, entered into a contract

[1]Reported in 99 Pac. 578.

whereby they agreed to sell and convey to George H. Brislawn and John A. Walker, as parties of the second part, 720 acres of agricultural land, in Whitman county, for the consideration of $22,000. The only portions of the contract material to the present inquiry are the following:

"And the said party of the second part agrees to pay the said sum of Twenty-two thousand dollars gold coin of the United States of America, as follows, to wit: Sixteen hundred dollars at or before the execution and delivery of these presents, the receipt whereof is hereby acknowledged, and the balance of said sum, to wit, Twenty thousand and four hundred dollars, together with interest thereon until fully paid at the rate of seven per cent per annum, upon the whole sum from time to time remaining unpaid, to be paid in the manner following, that is to say: Out of the whole wheat crop raised on said premises at end of each of the harvest seasons of 1905, 1906 and 1907, the interest due on unpaid balance of said principal sum, at the several times of selling said crops, is to be first paid out of the proceeds of the said crops, and one-half of the remainder is to be applied on payment of the said balance of the principal sum to the said party of the first part, and, for the remainder of the seasons commencing with 1908, and at the close of each harvest season during the existence of this agreement, and until the whole of the said principal sum and interest herein specified shall have been fully paid, one-half of the whole proceeds from wheat crops raised on said premises shall be applied towards the payment of the principal sum and the said party of the second part shall pay the interest at those times due on balance of principal then unpaid, out of the other one-half of each said crops;

"And the said parties of the second part agree that during the existence of this agreement they will, each year, seed to wheat not less than three hundred acres of the said land, and as much more than that as would be consistent with good farming, and will sow nothing but clean seed, and keep the said land and premises free from any and all noxious weeds, cure and care for all wheat so grown on said premises when ripe and in good and proper season, thresh the same as soon thereafter as possible, protect the grain after threshing and before delivery at the warehouse (at some station to be de-

cided upon between the said parties) by effectual covering, and that not more than thirty acres of the said land shall be used, each year, by the said party of the second part, for raising any kind of crops other than the wheat crops to be raised hereunder."

Also:

"It is further agreed by and between the said parties that the crops raised upon the said premises under this agreement shall be sold at such time or times as the said parties may, between themselves, decide to be the most advantageous and for their best, mutual, interests."

Brislawn and Walker entered into possession of the premises under their contract of purchase, and raised a crop of wheat during the season of 1905, which was stored in a warehouse owned by the defendant company. The defendant made advances on the wheat from time to time to the amount of $2,844 in all, and later purchased the wheat from Brislawn and Walker and paid them the balance due on the purchase price, after deducting the amount of the advances. This action was thereafter instituted by the plaintiffs to recover from the defendant damages in the sum of $1,860 for the conversion of their one-half of the wheat thus stored. At the close of the testimony, the plaintiffs moved the court to discharge the jury and direct a judgment in their favor. The defendant interposed a like motion. The plaintiffs' motion was granted and that of the defendant denied; and from the judgment thus rendered, the defendant has appealed.

Both parties concede that the court committed no error in withdrawing the case from the consideration of the jury, as there was no question of fact for the jury to pass upon, so that we will proceed at once to a consideration of the legal questions involved. The right of the respondents to maintain the action depends entirely upon the construction of the written contract between the parties. If under that contract they had no title to or interest in the wheat crop, the judgment directed by the court in their favor is erroneous, and must be reversed.

It is an elementary rule of law that the occupier of land is the owner of all crops harvested during the term of his occupancy, whether the occupant be a purchaser in possession, a tenant in possession, or a mere trespasser in possession holding adversely. *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406; *Clarke v. Clyde*, 25 Wash. 661, 66 Pac. 46; 24 Cyc. 1469. It follows, therefore, that any claim or interest the respondents may have had in the crop in controversy arose out of the contract of sale, the material parts of which we have already set forth. That contract simply provided that the principal and interest to become due on the purchase price of the land should be paid out of the proceeds of the sale of the crops, and that the respondents and the purchasers of the land should jointly designate the warehouse or station where the wheat should be stored, and the time when the wheat should be sold. These provisions, in our opinion, fall far short of vesting in the respondents any right or title in the crops. There may be no direct analogy between the relation of landlord and vendor, but, independent of statute, the rights of either in crops grown on the land which is the subject of the sale or lease are dependent on contract, and the construction which courts have uniformly placed on contracts between landlord and tenant is a safe rule to follow in construing similar contracts between vendor and purchaser. The general rule on this subject as between landlord and tenant is thus stated:

"The title to the crops raised by one man on another man's farm depends largely if not entirely upon the contract between the two men. If the contract amounts to a lease or demise of the land by the owner to the occupier, then clearly the crops belong to the occupier whether he pays rent in money, or in kind by a share of the crops. The occupier in such case becomes the owner *pro hac vice*, and has title to the products of the farm until division." 24 Cyc. 1469.

See, also, *Williams v. Smith*, 7 Ind. 559; *Lacy v. Weaver*, 49 Ind. 373, 19 Am. Rep. 683; *Chicago & West Mich. R. Co. v. Linard*, 94 Ind. 319, 48 Am. Rep. 155; *Clarke v. Cobb*,

121 Cal. 595, 54 Pac. 74; *Dixon v. Niccolls*, 89 Ill. 372, 89 Am. Dec. 312. See, also, *Moen v. Lillestal*, 5 N. D. 327, 65 N. W. 694, where a very similar contract was construed and held not to confer any right in the crops upon the vendor. But cases might be multiplied holding that contracts far more favorable to the contention of the landowner than is the contract in suit were insufficient to vest in such landowner any title or interest in crops garnered by another.

The judgment is reversed with directions to dismiss the action.

FULLERTON, MOUNT, DUNBAR, and CROW, JJ., concur.

CHADWICK and GOSE, JJ., took no part.

[No. 7406. Decided February 2, 1909.]

FRANK S. HUTCHINS *et al.*, *Appellants*, v. SARAH WERTHEIMER, *Respondent*.[1]

VENDOR AND PURCHASER—FRAUDS, STATUTE OF—CONTRACT TO SELL LANDS—AUTHORITY OF AGENT. A letter to real estate agents, who had represented the owner of property in the payment of taxes without authority to contract for sale, to the effect that the owner would be willing to sell certain lots at a certain price, does not authorize the agents to make a binding contract of sale which can be specifically enforced.

SAME—RATIFICATION OF SALE BY AGENT. Ratification of an unauthorized sale of lots for $6,500 exclusive of commission to the agents, is not shown by the owner's acceptance with the distinct understanding that the price was $6,500 net, she to pay no back taxes or other expenses, the property being subject to back taxes.

COURTS—APPELLATE COURTS—MOOT QUESTIONS. The supreme court will not decide abstract questions at the behest of parties having no interests at stake.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 5, 1907, in favor

[1]Reported in 99 Pac. 577.

of the defendant, upon granting a nonsuit, in an action for specific performance. Affirmed.

Kirkpatrick & Doty, for appellants
Willett & Willett, for respondent.

RUDKIN, C. J.—This was an action to enforce the specific performance of a contract for the sale of real property. On the 24th day of October, 1906, Crawford & Conover, real estate agents, of the city of Seattle, addressed the following letter to the defendant, at her home in Portland, Oregon: "We have a customer who we think will pay sixty-five hundred dollars cash for your ten lots in Cove addition, the same to be delivered clear of all special taxes. Kindly inform us whether you desire to sell at the above price, and oblige." Under date of October 25, 1906, the defendant replied as follows: "In reply to your favor of the 24th, I am willing to dispose of my ten lots in Cove addition at sixty-five hundred dollars, net to me. This offer to hold good for ten days only." On October 29th, 1906, Crawford & Conover, as agents for the defendant, entered into the contract now in suit, whereby the property described in the contract was to be conveyed to one F. A. Rivers for the sum of $7,000, payable on delivery of warranty deed and abstract within twenty days from date, all assessments to be paid in full. On the same day the agents wrote to the defendant as follows: "We beg to advise you that under your instructions of Oct. 25th, we have sold the ten lots in Cove Addition at a price of $6,500 exclusive of our commission. Please send the abstract immediately and advise us whether the deed comes from you alone and we will have it made and sent to you." On October 31, 1906, the defendant replied: "Your favor of the 29th is at hand. Agreeable to your request I am sending by Wells-Fargo's Express the abstract of the ten lots in the Cove Addition. The property belongs to me alone, and it is my distinct understanding that the price of

these lots is $6,500 net to me, and I pay no back taxes, commissions or any other expenses." The contract of October 29th was assigned to the plaintiffs, and after a proper tender and demand, this action was instituted to enforce specific performance. At the close of the plaintiffs' case, the court directed a nonsuit; and from this judgment, the present appeal is prosecuted.

While Crawford & Conover had represented the respondent for a great many years, paying taxes and making sales of property from time to time, it is not claimed that they had any general authority to make contracts for the sale of her real property. Nor do we find in the above correspondence any special authority for, or any ratification of, the contract actually entered into. This is but the common case of an agent employed to find a purchaser for property attempting to bind his principal by a formal contract of sale. We have so often held that such agents have no authority to bind their principals by contract that we only deem it necessary at this time to refer to our previous decisions. *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471; *Scully v. Book*, 3 Wash. 182, 28 Pac. 556; *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Monk v. Duell*, 41 Wash. 403, 83 Pac. 313; *Foss Investment Co. v. Ater*, 49 Wash. 446, 95 Pac. 1017.

The respondent entered a special appearance in the action and maintained her special appearance throughout, contending that jurisdiction over nonresidents cannot be acquired in this form of action by constructive service of process, and we are asked to consider and decide that question on this appeal. We must, however, decline to discuss or consider important questions of constitutional law or statutory construction at the mere behest of those who have no interests at stake.

Finding no error in the record, the judgment is affirmed.

CROW, MOUNT, and DUNBAR, JJ., concur.

CHADWICK, FULLERTON, and GOSE, JJ., took no part.

[No. 7604. Decided February 2, 1909.]

HANNAH E. DELACEY, *Appellant*, v. COMMERCIAL TRUST COMPANY *et al.*, *Respondents*.[1]

PUBLIC LANDS—SETTLEMENT—RIGHTS CONFERRED—HUSBAND AND WIFE. Settlement on government land by husband and wife confers no community interest.

SAME—ADVERSE POSSESSION—LIMITATIONS. An entryman on public lands cannot, pending a contest, set the statute of limitations in motion by claiming adverse possession.

SAME—CONTESTS—JUDGMENT—PARTIES CONCLUDED—WIFE OF ENTRYMAN. The wife of an entryman, who makes settlement on public land with him, is in privity with her husband as to a contest waged by him before the land department for the issuance of a patent; and upon the deciding of the contest against the entryman and his abandonment of the property, the wife, continuing to hold possession, does not hold under color of title or claim of right.

EJECTMENT—PARTIES. Where a contest in the land department has been decided adversely to an entryman in possession, his wife is not a necessary party defendant to an action of ejectment.

JUDGMENT—PARTIES CONCLUDED—HUSBAND AND WIFE. Where a contest in the land department has been decided adversely to an entryman in possession, his wife and members of his family claiming through or under him are concluded by the decision of the department.

EJECTMENT—TITLE. The plaintiff in ejectment must recover upon the strength of her own title rather than on the weakness of the defendants'.

Appeal from a judgment of the superior court for Pierce county, Reid, J., entered May 28, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to quiet title and recover possession of land. Affirmed.

Garretson & Early, *A. H. Garretson*, and *Chas. E. George*, for appellant.

Fogg & Fogg (*B. S. Grosscup*, of counsel), for respondents.

[1]Reported in 99 Pac. 574.

CHADWICK, J.—In April, 1886, James Delacey, husband of the plaintiff, made settlement with his family upon one hundred and sixty acres of land, lying within the corporate limits of the city of Tacoma, in Pierce county, intending to claim it under the homestead laws of the United States. The land was within the limits of the original grant in aid of the Northern Pacific Railroad Company, by Congress, under the act of July 2, 1864, and the acts and resolutions supplemental thereto and amendatory thereof. The company filed its maps of definite location May 14, 1874, and March 26, 1884, so that, at the time of the Delacey settlement, the land was not subject to private entry. It was so held in the several departments, and by the secretary of the interior, by whom the contest was finally decided November 28, 1891. *Northern Pac. R. Co. v. Flett*, 13 Land Dec. 617.

Patent was issued to the Northern Pacific Railroad Company, and filed for record in Pierce county, Washington, on January 18, 1893. In April of that year, the railroad company brought an action of ejectment against James Delacey, as sole defendant, in the United States circuit court for the district of Washington, in which judgment of ouster was obtained. This case was appealed to the supreme court of the United States. The decision of the lower court was affirmed May 22, 1899. *Northern Pac. R. Co. v. De Lacey*, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111. Pending the appeal to the supreme court of the United States, the Northern Pacific Railway Company succeeded to the rights of the original plaintiff in the ejectment case, and was substituted as the plaintiff therein.

Upon remand, final judgment was entered in the United States circuit court, sitting at Tacoma. Prior to the entry of the judgment, there was filed in said court a motion, in the name of James Delacey, defendant, supported by the affidavit of plaintiff, in which the statute of limitations, the community interest of plaintiff, and the fact that she had not been made a party to the action of ejectment, were urged as

reasons why the court should limit and confine its order of removal to defendant James Delacey. This motion was overruled and the judgment became *res adjudicata* as to all the rights of the parties to the ejectment suit.

In the fall of 1894, James Delacey abandoned the land and his family. His whereabouts, if alive, is now unknown. On March 22, 1900, plaintiff was ejected from the land under a writ of restitution issued out of the United States circuit court. In the year 1907, plaintiff was awarded a decree of divorce from her husband, and by a later modified decree it was adjudged that the property herein involved was community property, and the whole thereof was set apart to her sole and separate use. She has also acquired by deed the interest, if any, of all her children, the issue of her marriage with James Delacey. During the time the Delaceys lived on the land, from 1886 until March, 1900, valuable improvements were made. On the 7th day of November, 1905, the Northern Pacific Railway Company conveyed the lands in controversy to defendant the Commercial Trust Company. This action was brought by plaintiff to recover possession and quiet her title to the land. From a decree in favor of defendants, plaintiff has appealed.

It will be seen that appellant relies upon the assertion of a community interest in the land, and upon the statute of limitations. She claims that she "entered into the possession of the land as the owner thereof under a claim of right and in good faith, and has continued to occupy the same as the owner thereof by actual, uninterrupted, and notorious possession, under a claim of right, from April, 1886, to the latter part of March, 1900." The fact that James Delacey acquired no interest in the land, community or otherwise, is an adjudged fact, from which the conclusion must inevitably flow that the appellant could acquire no greater right than her spouse. The community is an entity; the rights of the wife cannot be disassociated from those of her husband; the right of each is dependent upon the other, and unless it exist

in the one it cannot exist in the other. It may be laid down as a fixed rule that no community interest results to the spouses by reason of settlement on government land. The entryman takes title upon such conditions and under such terms as the Congress may prescribe. The government may designate the object of its bounty, or its preferred vendee, and fix the terms of its indulgence. Under existing laws, there is no limitation upon its power to give or take away up to the time patent issues. Mere settlement creates no rights in the entryman other than those given by statute or recognized by rule of the department. Nor can he put the statute of limitations in motion against the government, either in his own behalf or in behalf of those whose occupancy on the land is dependent upon his entry. Therefore one contesting for government land cannot gain the advantage of the statute over his adversary while the contest or litigation in aid of his title is pending. *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982; *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330; *Hesser v. Siepmann*, 35 Wash. 14, 76 Pac. 295.

The homestead law was passed without reference to our local laws of property. *McCune v. Essig*, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237; *Hall v. Hall*, 41 Wash. 186, 83 Pac. 108, 111 Am. St. 1016; *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N.S.) 967; *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936. It is only when title is vested that the land becomes subject to the law of the state. It may then with propriety control its conveyance, provide for its taxation, and fix rules of descent. Appellant, therefore, did not, and could not, acquire any right by reason of her community relationship or as an individual prior to the final determination of the contest between her husband and the railway company. She held in privity with him. James Delacey did not enter adversely to the respondents' grantor, but as a homesteader, willing to try out his claim with the Northern Pacific Railroad Company under the rules

governing contests between conflicting claimants for the public land. Appellant is in no better position than he would have been had he remained on the land, for it is because of his entry and attempted filing that she became an occupant, and not because of the present assertion of an independent adverse claim under a claim of right. Appellant, though her possession was in a general sense adverse, did not, under the well-established rule in this state, hold under a claim of right or with color of title. It is not mere undisturbed, exclusive possession of property that makes title, but a hostile adverse possession under a claim of right or color of title, as the case may be. The foundation of the title, the time of its inception, must be marked with these essential elements. One essential will not follow another or be created by the mere lapse of time. All must concur from the beginning until the end of the period fixed by the statute. Otherwise no right to assert the statute accrues. *Port Townsend v. Lewis, supra.* Our holding is, that appellant has no community interest in the land; that neither she nor James Delacey had any interest whatever subject to the jurisdiction of the superior court of Pierce county in the divorce proceeding; that the deed from her children was of no effect; and that the running of the statute could not by any possible process of reasoning antedate the termination of the contest in the U. S. land departments, thus disposing of her claim under the ten-year statute of limitations.

Neither was appellant a necessary party to the ejectment suit. The successful contestant in the land department may invoke either the equity or the law side of the courts in aid of his title, and in so doing he is not bound to look for parties other than his adversary, for no interest could attach pending contest in the land department. But if the rule were otherwise as to third persons domiciled on the land, it is certain that the family of James Delacey, and all persons who could not assert a title or right independent of him, were bound by the judgment in the action of ejectment and subject to the

writ without being named therein. There being no independent or community interest in the appellant, the general rule in such cases applies. It is stated by Mr. Freeman as follows:

"The defendant and all the members of his family, together with his servants, employees, and his tenants at will or sufferance, may be removed from the premises in executing a writ of possession. . . . All persons entering upon the possession of the property *pendente lite* are presumed to have entered under the defendant; and *prima facie*, are liable to be turned out by the writ. It is obvious that the temptation to render the plaintiff's action fruitless by turning over the possession to one not a party to the suit is very great. All courts will exercise great caution in considering the right of a person to retain possession after the judgment, when it is clear that he entered *pendente lite*. His right will always be denied, unless it is clear that he did not enter under the defendant, nor by any collusion with him." Freeman, Executions (3d ed.), § 475.

See, also, *Saunders v. Webber*, 39 Cal. 287; 1 Herman, Estoppel, 204; *Lichty v. Lewis*, 63 Fed. 535; *Id.*, 77 Fed. 111.

This disposition of the case makes it unnecessary to discuss the remaining assignments of error, all of which go to the strength of respondents' title. It would be idle to consume space in the citation of authority to support the proposition that appellant must recover, if at all, upon the strength of her own title rather than upon the weakness of the title of the respondents.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, CROW, and MOUNT, JJ, concur.

DUNBAR and GOSE, JJ., took no part.

[No. 7779. Decided February 4, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Lee A. Johnson et al., Plaintiff*, v. C. W. CLAUSEN, *State Auditor, Respondent.*[1]

COLLEGES AND UNIVERSITIES—NATURE. The state college of Washington is a state institution.

STATES—FISCAL MANAGEMENT—FUNDS OF STATE COLLEGE—PAYMENT TO STATE TREASURER—STATUTES—CONSTRUCTION—IMPLIED REPEAL—GENERAL AND SPECIAL ACTS. Moneys received by the treasurer of the board of regents of the State College from students' fees and rents and sources other than the general and state government are not a part of the "State finances" to be paid over by him to the state treasurer, within the meaning of the act of 1907, p. 179, entitled "an act relative to the finances of the state....," which provides that each state officer or other person authorized to collect moneys belonging to the state or any institution thereof shall each day transmit all moneys to the state treasurer, although such college is a state institution; and the prior laws, making it the duty of the treasurer to collect and disburse such moneys, are not impliedly repealed by the act of 1907, p. 179; since repeals by implication are not favored, and special acts are not presumed to be repealed by a general act; considering also the subsequent act of 1907, p. 423, directing the treasurer of the board of regents to receive the annual appropriation of the general government for experiment stations (MOUNT and DUNBAR, JJ., dissenting).

Application filed in the supreme court, December 11, 1908, for a writ of mandamus directing the state auditor to issue warrants. Granted.

M. A. Folsom, W. J. Thayer, and *B. B. Adams*, for relators, contended that the money deposited with the treasurer was a trust fund belonging to the state college, and was under the absolute control of the board of regents. *State ex rel. Koch v. Barret*, 26 Mont. 62, 66 Pac. 504; *Louisville v. University of Louisville*, 54 Ky. 642; *State ex rel. Spencer Lens Co. v. Searle* (Neb.), 109 N. W. 770; *Board of Education v. Town of Union*, 52 N. J. L. 69, 18 Atl. 571; *Regents*

[1]Reported in 99 Pac. 743.

of University of California v. January, 66 Cal. 507, 6 Pac. 376; *State ex rel. Armington v. Wright*, 17 Mont. 565, 44 Pac. 89; *Wyoming ex rel. Wyoming Agricultural College v. Irvine*, 206 U. S. 278, 27 Sup. Ct. 613, 51 L. Ed. 1063.

John D. Atkinson, *Attorney General*, and *W. V. Tanner* and *William W. Manier*, *Assistants*, for respondent, contended, *inter alia*, that the State College of Washington is a state institution, and that all its property is the property of the state. *In re Royer's Estate*, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364; *Thomas v. Board of Trustees of Illinois Industrial University*, 71 Ill. 310; *Tucker v. Pollock*, 21 R. I. 317, 43 Atl. 369; *Neil v. Board of Trustees*, 31 Ohio St. 17; *State v. Vicksburg etc. R. Co.*, 51 Miss. 361. All appropriations must be made by the legislature, and the amount of such appropriation must be distinctly specified. Constitution, art. 8, §4; Bal. Code, § 155; *State ex rel. Publishing Co. v. Lindsley*, 3 Wash. 125, 27 Pac. 1019; *State ex rel. Board of Regents v. Stover*, 47 Kan. 119, 27 Pac. 850; *Martin v. Francis*, 13 Kan. 220; *State ex rel. Martin v. Humphrey*, 47 Kan. 561, 28 Pac. 722.

Gose, J.—This is a petition for a peremptory writ of mandamus against the respondent, as auditor of the state, commanding him to draw against the state treasurer two warrants, in the sum of $1,000 each, in favor of Frank J. Barnard, treasurer of the board of regents of the State College of Washington, and a warrant in favor of J. B. Duthie in the sum of $21.85.

The State College of Washington is an institution of learning located within the state, created and existing under and by virtue of the laws of the state. It has a board of regents consisting of five members, one of whom, Frank J. Barnard, is its treasurer. The board consists of Lee A. Johnson, J. J. Browne, Peter McGregor, Frank J. Barnard, and J. A. Anderson. The income of the college is derived in part from the general and state governments, in part from

students for rent, and in part from the sale of its agricultural products. During the year 1908, the treasurer of the board received from sources other than the general and state governments the sum of $7,493.75. Said sum was deposited with the state treasurer by the treasurer of the board, under the belief that he was required to do so. Said sum is now on deposit with the state treasurer. Thereafter it became necessary to make certain improvements and disbursements and pay certain running expenses, and the board appropriated by two separate resolutions the sum of $2,000 therefor. Each resolution appropriated the sum of $1,000 from the amount theretofore deposited with the state treasurer. A proper demand was made upon the state auditor to issue warrants drawn against such fund, for such sums respectively, in favor of the treasurer of the board. At the same time, and by a separate resolution, such board appropriated out of said money so deposited the sum of $21.85, to pay for merchandise furnished the board for the use of the college. A demand was made upon the auditor to draw a warrant therefor in favor of J. B. Duthie, the creditor party. These several demands were refused. The board has not sufficient funds aside from said deposit to pay the necessary running expenses of the college. There are more than twelve hundred students attending the institution. It will probably be necessary to close the college unless said fund can be withdrawn for use by the board. A demand was made upon the state treasurer to pay said sums, but he refused payment except upon a warrant drawn by the respondent. The respondent interposed a general demurrer to the petition. The only question presented for determination is the sufficiency of the complaint, and whether it warrants the relief sought.

The law-making body of the state in 1891, Laws 1891, page 334 *et seq.*, enacted a law entitled "An act to provide for the location and maintenance of the agricultural college, experiment station and school of science of the state of Washington." The name of the institution was later changed to

the "State College of Washington." Laws 1905, p. 83. The applicable part of section 1 of such act is as follows: "There is hereby established an institution of learning to be known as the agricultural college, experiment station and school of science of the state of Washington." Under section 2 of the act, it is "open to the children of all residents of the state, and to such other persons as the board of regents may determine, under such rules of regulation and terms as may be prescribed by said board of regents." (Bal. Code, § 2512; P. C. § 7432).

Other applicable code provisions are as follows: Section 2516 (P. C. § 7436), provides that the management of the college, the care and preservation of all property of which it shall become possessed, the erection and construction of all necessary buildings, the disbursements and expenditure of all money, shall be vested in a board of five regents to be appointed by the governor by and with the consent of the senate; and that each regent, before entering upon the discharge of the duties of his office, shall give a bond in the sum of not less than $5,000, conditioned for the faithful performance of official duties. Section 2517 (P. C. § 7437), provides, that the board of regents shall meet and organize by electing a president and treasurer from their own number; that the treasurer shall, before entering upon the discharge of his duties as such, execute a good and sufficient bond to the state, with two or more sufficient sureties, in the penal sum of not less than $40,000, conditioned for the faithful performance of official duties, and to be approved by the governor. Section 2518 (P. C. § 7438), makes the treasurer the financial officer of the board and requires him to keep a true account of all moneys received and expended by him. Section 2520 (P. C. § 7440), provides that "the board of regents shall direct the disposition of any moneys belonging to or appropriated by" the college. Section 2527 (P. C. § 7447), requires the treasurer of the board to make disbursements of the funds in his hands upon the order of the board when countersigned

by the secretary. Section 2513 (P. C. § 7433), provides: "The governor of the state of Washington, superintendent of public instruction, members of the legislature and county commissioners, shall be *ex-officio* visitors of said college."

The respondent contends that, under the law of 1907, pages 179, 180, it was his duty to refuse the requisition made upon him by the board of regents and its treasurer. In passing upon the demurrer it will therefore devolve upon us to consider the act, its relation to the former laws of the state, and the respective duties of the parties under such statutes. The act of 1907 is entitled, "An act relative to the finances of the state of Washington and providing the time when and manner in which moneys shall be paid into the state treasury." The part of the act which the respondent treats as applicable to the issue is as follows:

"Section 1. That it shall be the duty of each state officer or other person (other than county treasurers) who is authorized by law to collect or receive moneys belonging to the state or to any department or institution thereof, to transmit to the treasurer of the state each day, all moneys collected by him on the preceding day, together with a statement of the source from which each item of said money was derived and to transmit to the state auditor a duplicate of said statement."

The purpose of this act is clearly defined in its title, viz., that it was intended to apply to "the finances of the state." It contains no repealing clause. In accordance with his construction of this act, the treasurer of the board of regents paid certain money to the state treasurer. It is urged by the relators that the act has no application to the funds of the state college.

The first contention of the respondent, that the college is a state institution, may be conceded under the rule announced in the following cases: *In re Royer's Estate*, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364; *Thomas v. Board of Trustees of Industrial University*, 71 Ill. 310, *Tucker v. Pollock*, 21 R. I.

317, 43 Atl. 369; *Neil v. Board of Trustees*, 31 Ohio St. 15; *State v. Vicksburg etc. R. Co.*, 51 Miss. 361. The respondent next directs our attention to Bal. Code, § 155 (P. C. § 8485), by which it is made the duty of the state treasurer "to receive and keep all moneys of the state not expressly required by law to be received and kept by some other person." We do not see the applicability of this statute.

The important question is, do the words in the act of 1907 heretofore quoted, "or to any department or institution thereof," include moneys of the state college, as set forth in its petition? The obvious purpose of the act was to daily place in the hands of the state treasurer the "finances" of the state. The finances of the state in its broadest sense would probably include the money deposited by the college with the state treasurer. A reading of this act in connection with the then existing laws heretofore quoted makes it apparent that the legislature did not intend by this general language to reach out and include the fund in controversy. In addition to the code provisions to which reference has been made, Bal. Code, § 2514 (P. C. § 7484), provides for an extensive and costly course of instruction. Section 2515 imposes duties involving large expense on the board of regents. How can the board discharge its duties and meet the expenses of the same if its funds fall within the provisions of the act of 1907? The history of the general legislation of 1907 relative to this college forces the conclusion that it was the legislative intention to enlarge and increase its usefulness, rather than to lessen its efficiency. The act under consideration evidently contemplated that the money of the state arising from such sources as taxation and the sale of state lands, subject to the exceptions noted in the act, were the *finances* for which it provided. It does not purport to take from the board "the management of the state college and experiment station, the care and preservation of all property of which such institution shall become possessed, and the disbursement and expenditure of all money." It is worthy of observation that, not

only is the board required to give a bond, but the treasurer must obligate himself and his sureties in the sum of $40,000. Neither does this act by its terms take from the treasurer of the board the duty to make "disbursements of the funds in his hands on the order of the board," when properly countersigned. The law offers no substitute for these provisions, nor does it in either letter or spirit relieve the board and treasurer, or either, of the duties theretofore imposed. If construed to mean state finances *strictissimi juris*, it leaves the officers in position to carry forward the object of their trusteeship. If given any other construction, it burdens them with all their former duties but takes from them the means of efficient performance.

It is a familiar canon of construction that repeals by implication are not favored. In the case of *Meade v. French*, 4 Wash. 11, 29 Pac. 833, there was presented for the consideration of the court the construction of two acts. The old act provided that, in an action for assault and battery, if the plaintiff recover less than $10, he shall be entitled to costs only to the extent of the damages recovered. The later act provided that in any action in the superior court the prevailing party should be entitled to his costs except in actions in the jurisdiction of the justice of the peace, when commenced in the superior court. The court held that the later act did not repeal the former one. In the course of the opinion it remarked:

"Hence the rule obtains that repeals by implication are not favored, and courts will seek to harmonize the laws and preserve them, rather than declare them abrogated or repealed; and if by any reasonable construction they can stand together, they will both be enforced; and in construing statutes for the purpose of ascertaining whether repugnancy really exists, as well as to gather the intention of the legislature in any particular, the whole statute on the subject must be construed together."

See, also, *State ex rel. Purves v. Moyer*, 17 Wash. 643, 50 Pac. 492; *State v. Binnard*, 21 Wash. 349, 58 Pac. 210.

There is another rule of construction, equally familiar, viz., that a special act, or one relating to a particular subject, is not presumed to be repealed by a general act. Endlich on the Interpretation of Statutes, § 223, thus announces the rule:

"It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute, to say that a general act is to be construed as not repealing a particular one. . . . It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special act, or what is the same thing, by a local custom. Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to that special act, and that the general one was intended to embrace the special cases within the previous one; or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one. . . . The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction."

As supporting this view of construction, the act of 1907, pages 423-4, is both persuasive and instructive. Section 1 of said act reads:

"The state of Washington hereby assents to the purposes, terms, provisions and conditions of the grant of money provided in an act of Congress approved March 16, 1906, said act being entitled 'An act to provide for an increased annual appropriation for agricultural experiment stations and regulating the expenditure thereof,' and having for its purpose the more complete endowment and maintenance of agricultural experiment stations theretofore or thereafter established under an act of Congress approved March 2, 1887."

In section 2 it is provided that such annual appropriation shall be paid to "the treasurer or other officer duly appointed

by the board of regents of the state agricultural experiment station." This act is of later date than the one under consideration. It is true that this law was passed so as to comply with the act of Congress, but it is also true that, if we should adopt the liberal interpretation of the words "department or institution thereof," invoked by the respondent, this fund would be embraced within the meaning of such law. It is obvious that the legislature did not so intend.

The respondent has directed our attention to art. 6, § 4, of the constitution, but its applicability is not apparent. Keeping in mind the old law as well as the new, the title of the act of 1907, and the subsequent legislation to which reference has been made, we have no difficulty in reaching the conclusion that the act of 1907 was not intended to embrace the fund in controversy.

The writ will therefore issue as prayed for.

RUDKIN, C. J., FULLERTON, CHADWICK, and CROW, JJ., concur.

MOUNT, J. (dissenting)—In my opinion the act in question does not except the state college from its provisions. If that college is an institution of the state, which seems to be decided by the majority, then it is expressly included within the provisions of the act. The regents have so construed the act, because they have complied with its provisions and have deposited more than $7,000 with the state treasurer. No moneys can be drawn from the state treasury except in pursuance of an appropriation. Const., art. 8, § 4. No such appropriation has been made in this case. The decision in this case sets aside both the act in question and also this provision of the constitution. If the state college is not included within the meaning of the act, then upon the same reasoning no state institution is included, and the act is rendered nugatory as to such institutions.

I think the writ should be denied, and therefore dissent.

DUNBAR, J., concurs with MOUNT, J.

[No. 7836. Decided February 6, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE BEEMAN, *Appellant*.[1]

BURGLARY—NATURE OF OFFENSE—BREAKING. The gist of burglary is the breaking and entering with intent to commit a crime.

SAME—EVIDENCE. The mere possession of stolen property is not *prima facie* evidence of the breaking and entering, but a circumstance to be considered by the jury.

BURGLARY—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a conviction of burglary, where it appears that the house was broken open, and a feather bed stolen; that the property was found in the possession of the defendant, the feathers removed from the tick, the tick concealed, and that the defendant was seen in the vicinity of the house about the time of the burglary and tracks evidently made by his cart led to and from the house, although possession of the stolen property would not alone be *prima facie* proof of the burglary.

CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE. The general rule that a new trial will not be granted, for newly discovered evidence to impeach a witness, applies in a prosecution for burglary where the newly discovered evidence merely tended to contradict the owner's identification of the property, and the owner did not assume to positively identify it, identification having been made by another witness.

SAME. A new trial will not be granted in a criminal case to secure the evidence of a witness now a resident in the East, when it is only shown that counsel believe he will be present at the new trial; nor when his evidence would be only cumulative.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered March 7, 1908, upon a trial and conviction of the crime of burglary. Affirmed.

Cain & Hurspool, for appellant.

Otto B. Rupp and *John H. McDonald*, for respondent.

CHADWICK, J.—Appellant seeks to reverse this case upon the insufficiency of the evidence to sustain the verdict, and

[1]Reported in 99 Pac. 756.

upon the ground of newly discovered evidence. In his brief he lays down the premise that the unexplained possession of property recently stolen is insufficient to justify a conviction, citing the several decisions of this court to that effect. It will be borne in mind that appellant was charged with the crime of burglary, the gist of which is a breaking and entering with intent to commit a misdemeanor or felony. In such cases the rule is that the mere possession of stolen property without other evidence of guilt is not regarded as *prima facie* evidence of the breaking and entering, but is a circumstance to be considered by the jury with all other facts and circumstances, as disclosed by the evidence, or in determining the guilt or innocence of the accused.

No instruction was given or requested upon the point now urged by counsel; but, admitting the question as properly before us, we think there was sufficient testimony, if believed by the jury, to warrant a conviction in this case. The house burglarized was unoccupied at the time. It was broken into and property was taken, thus indicating that some one was guilty of the crime of burglary. The fact that property identified as belonging to the complaining witness was found at the home of the appellant might be insufficient in itself to warrant the verdict, but there was evidence tending to show that the property, a feather bed, was not only in the possession of the appellant, but that the feathers had been removed and the tick concealed from casual observation in a barrel of dirty clothes; that appellant had in his possession several flour sacks partially filled with feathers; that he endeavored to toll an officer, who held a search warrant, out of the house on pretense of going to the cellar, after a word in a whispered undertone to his wife; that appellant and his wife first denied possession of the feather bed, and upon discovery of the tick, made conflicting statements to the officer; that tracks of a two-wheeled cart drawn by two horses were discovered in front of the house upon the return of the owner; that the cart had been stopped and from it foot tracks led to and from the house;

that the cart tracks were followed for some distance in the direction of appellant's home; that the appellant was the owner of, and frequently drove about the country in, a two-wheeled cart drawn by two horses, and was seen in the vicinity of the house burglarized about the time the burglary must have occurred. The bed tick was positively identified by the person (a sister of the complaining witness) who made it. The case here presented is not nearly so strong in favor of appellant as was the case of *State v. Munson*, reported in 7 Wash. 239, 34 Pac. 932, where this court sustained a conviction; and as to the first assignment of error we are willing to rest this case upon that authority.

It is urged, however, that appellant is entitled to a new trial because the officer who executed the search warrant said upon cross-examination that the complaining witness had not, in describing the bed tick, said that it had a hole torn in it by the bed springs upon which it had been used, a fact denied upon the trial by the complaining witness; whereas, after the trial, he remembered that such statement had been made and would so testify upon a new trial. From the nature of the case, if the conviction rested upon the evidence of the complaining witness alone, there might be sufficient merit in this contention to take it out of the general rule that new trials will not be granted in order to supply evidence to sustain or impeach a witness. But the whole record shows that the complaining witness did not undertake to positively identify his property, but left that important fact to his sister, who recognized it as her own handiwork.

We are also asked to reverse the case that the evidence of one C. W. Hall, now a resident of Washington, D. C., may be obtained. He had been engaged as a clerk at a country store near the home of appellant, and, it is alleged, would testify that he sold the bed ticking, identified as the property stolen, to the wife of the appellant, a fact to which she had already testified. It is not shown that counsel who makes the affidavit has ever talked with Hall, nor does he say more than

that he believes that, if a new trial is had, Hall can be obtained as a witness. This showing is insufficient. If it were otherwise sufficient, the testimony would be merely cumulative.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, MOUNT, DUNBAR, and CROW, JJ., concur.

[No. 7546. Decided February 6, 1909.]

N. W. PEARSON, *Respondent*, v. ALASKA PACIFIC STEAMSHIP COMPANY, *Appellant*.[1]

MASTER AND SERVANT—EMPLOYMENT OF INCOMPETENT COSERVANT—EVIDENCE—SUFFICIENCY. A master who employs a stevedore as winch driver in loading a vessel must use reasonable effort to ascertain his qualifications, and cannot escape liability by showing that there was nothing in his conduct during two hours' employment indicating incompetency, or that he was a member of a union from which defendant was under contract to exclusively employ stevedores.

SAME—EVIDENCE OF CARE IN SELECTING SERVANTS—ADMISSIBILITY. Upon an issue as to whether a master had made reasonable effort to ascertain the competency of a stevedore employed as a winch driver in loading a vessel, evidence is inadmissible that the master was under contract to employ exclusively the members of a union, and relied upon the union to furnish a competent winch driver, where it further appears that the winch driver was incompetent and that neither the master nor the union, which was his agent, made any inquiries as to the competency of the employee.

SAME—EVIDENCE OF NEGLIGENCE—EXPERTS. As opinion evidence is inadmissible where the jury can deduce reasonable inferences without special skill or knowledge, it is proper, in an action for injuries sustained by a hatch tender through the negligence of an incompetent winch tender in not properly acting upon a signal given him, to exclude expert opinions as to whether a winch driver might mistake the levers, whether one familiar with winches could determine in two hours as to the competency of the winch driver or the propriety of his operation, and whether it was proper for plaintiff to take hold of the load so as to allow himself to be caught.

[1]Reported in 99 Pac. 753.

SAME—NEGLIGENCE—EVIDENCE OF NEGLIGENT OPERATION. In an action for personal injuries sustained through the negligent operation of a winch, it is proper to exclude evidence as to how another more complicated winch of different make is operated.

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse instructions covered in the general charge.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $7,500 for personal injuries is not excessive where the plaintiff was a stevedore, twenty-eight years old, having an average earning capacity of $1,200 per year, and his knee cap and elbow joint were fractured, bones had to be removed, and he lost the use of his arm, so that his earning capacity at manual labor was practically destroyed.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 14, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action by a stevedore for personal injuries. Affirmed.

Ira A. Campbell and *Bogle & Spooner*, for appellant.

W. E. Southard and *R. B. Brown*, for respondent.

RUDKIN, C. J.—On the 19th day of October, 1906, the plaintiff and other stevedores in the employ of the defendant were engaged in loading cargo from one of the wharves at the port of the city of Seattle to the deck of the steamer Watson. The plaintiff acted as hatch tender, and gave the signals to the winch driver, directing him when and how to start, run, and stop the winch, as might be necessary in discharging and loading cargo. At the time of receiving the injuries complained of in this action, the plaintiff and his co-employees were loading so-called brick scows from the wharf to the steamer deck. The winch driver, in obedience to signals from the plaintiff, hoisted two of the scows from the wharf and swung them to a position over the deck, between the hatch coamings and the side of the vessel. The plaintiff then directed the winch driver to lower the scows to the deck, but instead, by an improper movement of the levers by which the winch was operated and controlled, the winch driver swung the scows over the hatch coamings and hatchway, knocking the

plaintiff through the hatchway to the bottom of the vessel, thereby causing the injuries for which a recovery is here sought. The case was tried before a jury, resulting in a verdict in favor of the plaintiff in the sum of $7,500; and from the judgment on this verdict, the defendant has appealed.

The appellant has assigned error in the refusal of the court to grant a nonsuit at the close of the respondent's case, or to direct a judgment in its favor at the close of all the testimony. These two assignments present the same general question, and may be considered together. The principal ground of negligence charged in the complaint was the allegation that the appellant employed and retained in its employ an incompetent and inexperienced winch driver. The appellant contends that the hatch tender and the winch driver were fellow servants; that the only evidence of incompetency or inexperience on the part of the winch driver was the single act of negligence which caused the injury complained of, and that a single act of negligence on the part of a servant is not sufficient evidence of incompetency or unskillfulness to charge the master with knowledge of such incompetency or unskillfulness.

That the hatch tender and winch driver were fellow servants may be conceded, for the purpose of this appeal, and we might also concede that the appellant's further contention is sound, if the single act of negligence which caused the injury were the only evidence of incompetency or unskillfulness on the part of the winch driver. But we think the testimony of the winch driver himself tends very strongly to show that he was both inexperienced and incompetent. When the master places a servant in charge of dangerous machinery where special knowledge, skill, or experience is required for its safe and successful operation, he must make reasonable effort to ascertain the qualifications of the servant thus employed, and if he fails to do so he cannot escape liability by showing that there was nothing in the conduct of the servant during the

course of two hours' employment to demonstrate or give notice of his incompetency.

The rule is thus stated by this court in the recent case of *Seewald v. Harding Lumber Co.*, 49 Wash. 665, 96 Pac. 221:

"It was respondent's duty to make reasonable effort to learn the qualifications of the engineer, having regard to the safety of the other men, and it was for the jury to say whether it had learned, or by the exercise of reasonable care might have learned, of that incompetence in time to have removed him and prevented this accident. Speaking of the degree of care required of a master in the selection of servants, the court, in *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454, 460, 2 Sup. Ct. 932, 27 L. Ed. 605, said: 'It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered.' "

There is nothing in the record before us to indicate that the appellant made any effort to ascertain the qualifications of the winch driver at the time of or prior to his employment, except an offer to prove that the appellant had a contract with the Longshoremen's Union of Seattle, of which the respondent is a member, under which the appellant agreed to employ members of that Union exclusively; and we are clearly of opinion that the testimony was ample to warrant the jury in finding that the winch driver was incompetent and inexperienced; that such incompetency and inexperience might have been ascertained by the appellant prior to the injury by the exercise of reasonable diligence on its part; that the incompetency and inexperience of the winch driver was the direct and proximate cause of the injury, and that the respondent was not guilty of contributory negligence. The motions for nonsuit, and for a directed verdict were therefore properly denied.

The appellant offered to prove that it had a contract with the Longshoremen's Union, of which the respondent is a member, whereby it agreed to employ members of that Union exclusively; that said Union is an association organized for the

purpose of furnishing experienced men in loading and unloading vessels at the port of Seattle; that the Union furnished the winch driver in question pursuant to a request from the appellant; and that the appellant relied upon the fact that the winch driver thus furnished was competent to discharge the duties assigned him; but an objection to the offer of proof was sustained. As stated above, there was in our opinion ample evidence to establish the fact of incompetency on the part of the winch driver, and in view of the fact that the safety of other employees of the common master required that the winch driver should possess special knowledge and skill, it was incumbent on the master to make reasonable effort to ascertain his competency and fitness. It is conceded that the master made no inquiry itself, and that no inquiry was made by the Union which the master constituted its agent for that purpose. Admitting, therefore, that the master is presumed to exercise proper care in the selection of his servants, that presumption cannot prevail when it affirmatively appears that both the master and the agency to which he intrusts that duty have been negligent and derelict in that regard. There was, therefore, no error in the ruling complained of.

Error is assigned in the rulings of the court sustaining objections to the following questions propounded by the appellant to certain of its witnesses:

"I will ask you, Mr. Maunder, as an expert, whether or not the fact that one of the winches on the aft deck of the 'Watson' responded to the application of steam quicker than either a double winch with the lever working up and down, or a single winch, would in your judgment cause a man operating the winch to make the mistake of starting the winch ahead when he should have backed it?

"Q. State whether or not in your judgment, as an experienced stevedore, familiar with the operation of winches and the duties and position of hatch tender, a hatch tender with five years' experience could tell from two hours' operation of a winch, one of the winches on the aft deck of the 'Wat-

son,' whether or not those winches were being operated in a proper and competent manner by the winchman?

"Q. I will ask you whether or not, in your judgment as an experienced stevedore, it is proper for a hatch tender to take hold of a swirling load of cargo which is about to be landed on the deck of a vessel, in such a manner as to permit himself to be caught between that load and the hatch coaming when the load is swinging over the hatch hold?

"Q. I will ask you whether or not, in your judgment, Mr. Rogers, a man who has acted as stevedore on board ships for five years, and during that time has tended hatch, is competent to pass upon the proper or improper operation of the winch on the aft deck of the 'Watson'?"

We do not think that the subject-matter of these inquiries involved any of the mysteries of any particular science, trade, or craft, and the jury was as competent to draw correct inferences in relation thereto as the witnesses to whom the questions were propounded.

"When all relevant facts can be or have been introduced before the jury, and the latter are able to deduce a reasonable inference from them, no reason exists for receiving opinion evidence, and it is inadmissible. 'The governing rule deduced from the cases permitting the opinions of witnesses is that the subject must be one of science or skill or one of which observation and experience have given the opportunity and means of knowledge, which exists in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it.' Ordinary standards of conduct, of safety or danger, comfortable endurance or human ability in a customary connection, the operation of well known natural laws, the application of force in a familiar form, the common characteristics of animals and what is likely to frighten or otherwise injure them, or what, on the other hand, may be approached by them with safety, and methods of doing business which involve no special training, are within this rule. So also the existence of social customs, inferences drawn from ordinary resemblances, and in general whatever any one may observe for himself and reach a reasonable conclusion with regard to it may be decided by a

jury without the assistance of any experience other than their own. It does not follow, because a witness is duly qualified and the general subject is a proper one, that his judgment can be asked on any branch of the inquiry. The precise point of each individual inquiry must be beyond the intelligence of an average jury, and, 'so far partake of the nature of a science as to require a course of previous habit or study in order to an attainment of a knowledge of them.' The specific decisions under this general rule turn too frequently upon the facts of the particular case to warrant an attempt at exact classification. If the jury, although presumably devoid at the beginning of a trial of experience concerning a subject-matter, can be so informed during its progress as to reach an accurate conclusion, the subject is not one for an inference, conclusion, or judgment, and the evidence may be excluded in the discretion of the court." 17 Cyc. p. 41 *et seq.*

Within this rule, the court did not abuse its discretion in the rulings complained of. The ruling of the court in sustaining an objection to the following question is also assigned as error: "Q. I will ask you how the lever on the single winch operates?" We fail to see the materiality of this question, as the winch on the steamer Watson was of a different make and of a more complicated kind. Exception was also taken to the refusal of the court to give certain instructions requested by the appellant, but the requests so far as proper or material were embodied in the general charge of the court.

The only remaining assignment is the refusal of the court to grant a new trial, because the verdict is excessive. At the time of receiving the injuries complained of, the respondent was twenty-eight years of age, and had an earning capacity of from $115 to $130 per month during seven months of the year, and of $75 per month during the remaining five months, making an average earning capacity of upwards of $1,200 per year. His kneecap and elbow joint were fractured and it became necessary to remove portions of the bone from the elbow joint by reason of tubercular infection, so that the respondent has and will have no use of the injured arm. His

earning capacity in the particular employment in which he was engaged and earned his livelihood, or in the performance of manual labor in any other employment, is practically destroyed; and under such circumstances, we cannot say that a verdict of $7,500 is excessive.

Finding on error in the record, the judgment is affirmed.

FULLERTON, MOUNT, and DUNBAR, JJ., concur.

[No. 7706. Decided February 6, 1909.]

GEORGE APKER *et al.*, *Respondents*, v. THE CITY OF HOQUIAM, *Appellant*.[1]

APPEAL—RECORD—RULINGS ON PLEADINGS. The supreme court will not review error on a motion to make the complaint more definite and certain, where the record fails to show that the motion was acted upon.

HUSBAND AND WIFE—ACTION FOR PERSONAL INJURIES—PARTIES—JOINDER OF WIFE. Bal. Code, § 4827, authorizes an action by husband and wife to recover for personal injuries sustained by the husband.

MUNICIPAL CORPORATIONS—TORTS—STREETS — OBSTRUCTIONS — NOTICE OF CITY—PLEADING—SUFFICIENCY. A complaint alleging the existence of obstructions in a street and that the street was dark at night, "of all of which defendant had actual knowledge", refers both to the obstructions and darkness and sufficiently alleges notice on the part of the city.

SAME—CONSTRUCTIVE NOTICE. The obstruction of a main street in a city by piles of gravel, for thirty days, imputes notice of its existence to the city.

APPEAL—REVIEW—HARMLESS ERROR—IRRELEVANT TESTIMONY. In an action for personal injuries to a traveler by team, through a defect in a street, it is error without prejudice that evidence was admitted of injuries received by the other occupants of the carriage, where the court cautioned the jury that it was admitted as a part of what occurred at the time and must not be considered in connection with plaintiff's injuries.

[1]Reported in 99 Pac. 746.

MUNICIPAL CORPORATIONS — TORTS—STREETS—OBSTRUCTIONS—NOTICE—EVIDENCE. In an action for injuries sustained through the obstruction of a street by piles of gravel for thirty days, it is immaterial that gravel deposited was removed from time to time and other gravel deposited in its place, and evidence thereof is properly excluded.

SAME—DEFENSES—PLAINTIFF'S NOTICE OF OBSTRUCTIONS. Contributory negligence is a question for the jury, where it appears that the plaintiff was injured by driving at night upon piles of gravel obstructing a street, and that he drove along the street the same morning and saw or should have seen the obstructions at that time.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 1, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries to a traveler by team, caused by a defect in a street. Affirmed.

J. B. Bridges and *S. M. Heath*, for appellant.

W. H. Abel, for respondents.

RUDKIN, C. J.—On the evening of September 8, 1907, the plaintiff George Apker, accompanied by his wife, daughter, and niece, drove his team along one of the public streets of the city of Hoquiam. By reason of the darkness of the night the team was driven into a pile of gravel or building material in the street. The horses stumbled, a singletree broke, the neck-yoke became detached from the pole, the horses became unmanageable and dashed across the street, striking a telephone pole on the opposite side and throwing the occupants of the carriage into the street, causing personal injuries to the plaintiff George Apker, for which a recovery was sought in this action. From a judgment in favor of the plaintiffs, the present appeal is prosecuted.

While numerous errors are assigned in the appellant's brief, the only assignments discussed are the following: (1) Error in overruling a motion to make the complaint more definite and certain; (2) error in overruling a demurrer to the complaint; (3) error in admitting testimony as to injuries to

the occupants of the carriage, other than the respondent George Apker; (4) error in refusing to permit the appellant to show by cross-examination that the gravel placed in the street the week previous to the accident had been removed prior to the accident; and (5) error in denying a motion for nonsuit on the ground that the respondent George Apker assumed the risk, if any.

(1) The record fails to show that the motion to make the complaint more definite and certain was called to the attention of the lower court or was acted upon by that court, and there is, therefore, no ruling before us to review.

(2) In support of its demurrer, the appellant contends that the complaint fails to state a cause of action in favor of the respondent Ida Apker, wife of the respondent George Apker, and that the complaint fails to state a cause of action in favor of either respondent because it fails to allege that the appellant had notice or knowledge of the obstruction in the street prior to the accident. In answer to the first contention, it is sufficient to say that Bal. Code, § 4827 (P. C. § 255), provides that "Husband and wife may join in all causes of action arising from injuries to the person or character of either or both of them, or from injuries to the property of either or both of them, or arising out of any contract in favor of either or both of them."

The third paragraph of the complaint is as follows:

"That for some years past and at this time the city of Hoquiam has maintained a public street known as 'I' street, extending in part from 8th street to 7th street, the same being at all said times one of the main public thoroughfares in said city of Hoquiam; that on September 8, 1907, and for a considerable period of time to wit, 30 days prior thereto, said 'I' street between 8th and 7th streets, was in a dangerous, obstructed and defective condition, in this, that piles of material, principally gravel, had been placed between 8th and 7th streets within the limits of said 'I' street, a distance of about 100 feet about midway between said 8th and 7th streets, said piles of gravel consisting of several wagon loads

thereof; that said street in said condition was unsafe, dangerous, defective and obstructed; that at night said street was not lighted but remained dark so that persons traveling over said street, using due and ordinary care, would be liable to run into said obstructions and piles of gravel and receive injuries thereby; that said street had remained in said condition for a considerable period of time, during the whole of which time it was dark at night and unlighted, of all of which defendant had actual knowledge and due notice."

The closing words of this paragraph; viz., "of all of which defendant had actual knowledge and due notice," manifestly refer to both the obstruction in the street and the absence of light. Furthermore, the obstruction existed for such a length of time that the law will impute notice of its existence to the city. The demurrer was properly overruled.

(3) We are at a loss to know upon what theory the court admitted testimony tending to show the nature and extent of the injuries to the occupants of the carriage, other than the respondent George Apker. Such testimony had not the remotest tendency to prove negligence on the part of the appellant, want of negligence on the part of the respondents, or the nature or extent of the injury to the respondents. But while we are of opinion that this testimony was clearly incompetent and irrelevant, the court warned the jury that it was admitted simply as a part of what occurred at the time of the accident, and that they should not consider it in relation to or in connection with any injuries suffered by the respondent George Apker. When the jury were thus cautioned, we fail to see how the rights of the appellant could be in any manner affected or prejudiced by the error complained of.

(4) It appears from the testimony that the appellant granted permission to an abutting property owner on the street to obstruct or occupy portions of the street, by placing gravel and building material therein, and that the material thus placed was removed from time to time and other material placed in its stead. It would seem utterly immaterial, so far

as the rights of the parties before the court are concerned, whether the load of gravel which caused the injuries remained in the street for two weeks, or whether the load was removed each day and another substituted in its place. The negligence on the part of the appellant would be the same and the injury to the respondents the same in either case, and there was, therefore, no error in the ruling complained of.

(5) The principal argument urged in support of the motion for nonsuit is based upon the fact that the respondents passed along the same street on the morning of the day of the accident, and saw or should have seen the obstruction therein. Conceding that the respondents passed along the street that morning, and saw or should have seen the obstruction complained of, nevertheless, the question of contributory negligence was one of fact and for the jury.

There is no error in the record and the judgment is affirmed.

FULLERTON, CHADWICK, MOUNT, DUNBAR, and CROW, JJ., concur.

GOSE, J., took no part.

[No. 7765. Decided February 6, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Walter S. McCalley, Petitioner*, v. THE SUPERIOR COURT FOR WALLA WALLA COUNTY, *Respondent*.[1]

PROHIBITION—TO COURTS—RESTRAINING PROSECUTION—ADEQUATE REMEDY BY APPEAL. Prohibition does not lie to restrain proceedings under an information for seduction which had been stayed by marriage, under Laws 1905, p. 57, on the ground that the law is unconstitutional and that the court erred in refusing to quash the information, since there is an adequate remedy by appeal.

Application filed in the supreme court December 4, 1908, for a writ of prohibition to the superior court for Walla Walla county, Brents, J., to restrain proceedings under an information for seduction. Writ denied.

S. R. Stern and *T. P. & C. C. Gose*, for petitioner.

Otto B. Rupp and *Herbert C. Bryson*, for respondent.

RUDKIN, C. J.—On the 2d day of January, 1907, an information was filed in the superior court of Walla Walla county, charging the petitioner, Walter S. McCalley, with the crime of seducing and debauching one Amelia Villa, an unmarried woman of previous chaste character. The petitioner was arraigned under the information and entered a plea of not guilty. Thereafter on the 23d day of January, 1907, and while the prosecution was still pending, the petitioner and Amelia Villa intermarried, and all further proceedings under the information were stayed by virtue of section 1 of the act of February 24, 1905, Laws of 1905, p. 57, which reads as follows:

"If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the

[1]Reported in 99 Pac. 740.

county jail not exceeding one year. If before judgment upon an information or indictment the defendant marry the woman seduced, all proceedings under such information or indictment shall be stayed, and no further proceedings shall be had thereunder so long as the defendant shall live with, provide for, and support his wife; but if at any time within three years from the date of such marriage the defendant shall wrongfully fail to support or to provide for or shall wrongfully desert or abandon his wife, prosecution shall proceed under said information or indictment in the same manner as though no marriage had taken place."

On the 13th day of November, 1908, the prosecuting attorney of Walla Walla county filed in the superior court a further or supplemental information, charging that on the 2d day of August, 1907, the petitioner wrongfully failed to support and provide for, and wrongfully deserted and abandoned, and failed and refused to live with, his wife, and has ever since wrongfully continued to do so, and prayed that proceedings under the first mentioned information be no longer stayed, and that the petitioner be placed on trial on the original charge and dealt with according to law.

On the filing of this supplemental information, the superior court made an order requiring the petitioner to appear on November 17, 1908, and show cause, if any he had, why the stay of proceedings should not cease and why he should not be placed on trial on the original charge. The petitioner appeared in obedience to the show cause order and moved that the same be quashed, but his motion was denied. The petitioner then demurred to the information and the supplemental information, but his demurrers were overruled and the cause set down for trial. Thereupon the petitioner applied to this court for a writ of prohibition, restraining the superior court and the judge thereof from taking further proceedings under the information or the supplemental information, and the case is now before us for consideration on the return to a show cause order.

The contention of the petitioner, as we understand his counsel, is, first, that the act of 1905, *supra*, is unconstitutional, because it deprives the petitioner of the right to a speedy trial as guaranteed to him by the constitution of the state; and, second, that if the act be constitutional the petitioner is first entitled to a trial of the question whether he has wrongfully failed to support or provide for, or has wrongfully deserted or abandoned his wife. As we view the question thus presented, under repeated rulings of this court, we cannot consider the constitutionality of the statute or questions of practice arising thereunder on an application of this kind. The legislature of this state has provided an orderly method for a review of final judgments by this court in all actions, civil and criminal, and that remedy is exclusive of all others, unless it be shown that the remedy by appeal is inadequate. The petitioner contends that he has no appeal from the order denying the motion to quash the show cause order or overruling the demurrers to the information and supplemental information, and that, unless the court below is restrained from taking further proceedings, he will be compelled to submit to a trial under an information based on a void statute, before an appeal can be taken or a hearing had thereon, all of which is contrary to law and the protection guaranteed to him by the state constitution and the constitution of the United States. We fail to see, however, wherein the petitioner is in a worse plight than any other defendant who is placed on trial on an information which fails for any reason to charge a crime. Had the information failed to allege that the woman was unmarried or of previous chaste character, the same misfortune would befall the petitioner.

A trial court may erroneously refuse to quash an information or indictment, it may erroneously deny to a defendant the benefit of a plea of former jeopardy, it may erroneously uphold a bad information or indictment, or it may uphold an invalid statute, but all such defenses must be presented and

tried out in an orderly way, and an appeal to a higher court has always been deemed an adequate remedy for the correction of such errors.

In *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395, after reviewing our previous decisions this court said:

"We again announce the rule that the adequacy of the remedy by appeal, or in the ordinary course of law, is the test to be applied by this court in all applications for extraordinary writs, and not the mere question of jurisdiction or lack of jurisdiction; and that the adequacy of the remedy by appeal does not depend upon the mere question of delay or expense. There must be something in the nature of the action or proceeding that makes it apparent to this court that it will not be able to protect the rights of the litigants or afford them adequate redress, otherwise than through the exercise of this extraordinary jurisdiction."

In *State ex rel. Martin v. Hinckle*, 47 Wash. 156, 91 Pac. 640, where the validity of an ordinance of the city of Spokane was challenged, the same rule was applied, the court saying:

"In this case the appellant had an adequate remedy in the ordinary course of law, either by appeal from an adverse judgment or by application for a writ of habeas corpus."

Believing, therefore, that the petitioner has an adequate remedy by appeal, his application for a writ of prohibition should be denied, and it is so ordered.

FULLERTON, MOUNT, and CROW, JJ., concur.

CHADWICK and GOSE, JJ., took no part.

[No. 7848. Decided February 6, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Charles E. Coon, Plaintiff*, v. M. E. HAY, *Respondent*.[1]

ELECTIONS—NOMINATIONS — PRIMARY ELECTIONS — DISQUALIFICATION OF CANDIDATE—ADVERTISING—STATUTES—CONSTRUCTION. Laws 1907, p. 472, § 28, disqualifying any candidate for office who pays for "any article or published statement in a newspaper wherein the electors are advised or counseled to vote for such candidate, or his fitness or qualifications for office are set forth, or his photograph or biography is published" does not disqualify one who paid for the publication of his photograph, over a statement of his name and candidacy, and marked "Paid Advertisement"; in view of the severity of the penalty and of the obscurity in this and the next section, wherein it is made a misdemeanor for publishers of newspapers to publish for pay, articles advocating a candidacy, except when appearing and designated as a "Paid Advertisement;" and since the same is not an article or published statement wherein the electors are advised to vote for him or wherein his fitness is discussed (RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., dissenting).

Application for a writ of *quo warranto* to the Lieutenant Governor, filed in the supreme court January 13, 1909, heard upon demurrer to the petition. Writ denied.

Reynolds, Ballinger & Hutson, for relator, contended that an information in the nature of *quo warranto* is the proper method by which to try title to public office. Bal. Code, § 5780 *et seq; State ex rel. Heilbron v. Van Brocklin*, 8 Wash. 557, 36 Pac. 495; *People ex rel. Barton v. Londoner*, 13 Colo. 303, 22 Pac. 764, 6 L. R. A. 444; 10 Am. & Eng. Ency. Law (2d ed.), 798. The clause in art 3, § 4, of the constitution providing that "contested elections for office shall be decided by the legislature in such manner as shall be decided by law" is not self-executing, since no such law has been enacted. *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158; *Northwestern Warehouse Co. v. Oregon R. &*

[1]Reported in 99 Pac. 748.

Nav. Co., 32 Wash. 218, 73 Pac. 388; 8 Cyc. 752-3, and notes; *People ex rel. Barton v. Londoner, supra.* The conflict between the claims of Coon and Hay is not a contest within the meaning of that clause, but refers to contests between candidates at an election involving the respective numbers of votes received by each. 15 Cyc. 396; *Magruder v. Swann*, 25 Md. 173, 204; *People ex rel. Barton v. Londoner, supra.* Conceding the application of § 4, article 3, of the state constitution, it furnishes an accumulative remedy only. 17 Ency. Plead & Prac., 423-4, 825-6; 10 Am. & Eng. Ency. Law (2d ed.), p. 800; 15 Cyc. 395-6, and cases cited; McCrary, Elections (4th ed.), §§ 380, 382; 2 Spelling, Extraordinary Remedies (2d ed.), 1776; Throop, Public Officers, § 397; *State ex rel. Blake v. Morris*, 14 Wash. 262, 44 Pac. 266; *State ex rel. Hyland v. Peter*, 21 Wash. 243, 57 Pac. 814; *State ex rel. Thayer v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; *People ex rel. Barton v. Londoner, supra; People ex rel. Swift v. Bingham*, 82 Cal. 238, 22 Pac. 1039; *People ex rel. Hatzel v. Hall*, 80 N. Y. 117; *McVeany v. Mayor etc. of New York*, 80 N. Y. 185, 36 Am. Rep. 600; *State v. Gates*, 35 Minn. 385, 28 N. W. 927; *State v. Kempf*, 69 Wis. 470, 34 N. W. 226, 2 Am. St. 753. The only exception to this rule is found in the exclusive right of each house of the legislature to judge the qualifications and elections of its own members. This is an exception arising from public policy. Throop, Public Officers, § 397. A lieutenant governor is not a member of the senate. The constitution prescribes the membership. Const., art. 2, §§ 1, 2, 6, 7. "Legislature" and "law making power" are not identical. The latter includes governor, the former does not. *Brooks v. Fischer*, 79 Cal. 173, 21 Pac. 652, 4 L. R. A. 429. The legislature has concurrent jurisdiction with the supreme court in *quo warranto* proceedings, and the tribunal first assuming jurisdiction holds it. *McVeany v. Mayor etc. of New York, supra.* The terms "legally qualified" and "eligible" are synonymous. *Kirkpatrick v. Brownfield*, 97 Ky. 558, 31 S.

W. 187, 53 Am. St. 422, 29 L. R. A. 703. If the candidate receiving the highest number of votes is ineligible, there is no election. 15 Cyc. 391; Throop, Public Officers, §§ 160-3; McCrary, Elections (4th ed.), §§ 327, 329, 330, 349; *State ex rel. Goodell v. McGeary*, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446; *State ex rel. Thayer v. Boyd, supra.* The election of an ineligible person is void and confers no right to office. 23 Am. & Eng. Ency. Law (2d ed.), 338. The relator has sufficient interest in the office to warrant the maintenance by him of a proceeding to contest the eligibility of his successor. 15 Cyc. 403-4; Bal. Code, § 5780 *et seq.; Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. 802, 22 Am. St. 729, 11 L. R. A. 272; *State ex rel. Thayer v. Boyd, supra; Roane v. Matthews*, 75 Miss. 94. The certificate of the canvassing board is *prima facie* proof of claimant's election and eligibility, and he thereby becomes a *de facto* officer and is entitled to assume and hold the office until his ineligibility is determined. *State ex rel. King v. Trimbell*, 12 Wash. 440, 41 Pac. 183. But such certificate is only *prima facie* proof and may be overcome in *quo warranto* proceedings by proof of ineligibility. 2 Spelling, Extraordinary Remedies (2d ed.), § 1876; McCrary, Elections (4th ed.), §§ 319, 418; *State ex rel. Blake v. Morris* and *State ex rel. Hyland v. Peter, supra.* The returning officer cannot pass upon the eligibility of the candidate, but must declare the result from the returns placed in his hands. Mechem, Public Officers, §§ 207-9; McCrary, Elections (4th ed.), §§ 263, 385, 411; Throop, Public Officers, § 156; 10 Am. & Eng. Ency. Law (2d ed.), 746-7, and notes; 2 Spelling, Extraordinary Remedies (2d ed.), § 1563; *People ex rel. Sherwood v. State Board of Canvassers*, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646; *State ex rel. King v. Trimbell*, 12 Wash. 440, 41 Pac. 183. The legislature may prescribe reasonable qualifications for holding office. *State ex rel. Thompson v. McAllister*, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343; *Darrow v. People*, 8 Colo. 417, 8 Pac. 661; *State ex rel. Attorney General v. Covington*, 29

Ohio St. 102; Mechem, Public Officers, §§ 73-74. Although the legislature may not add to the constitutional qualifications imposed upon the voter in granting the right of suffrage, laws are upheld which disfranchise the voter for wilful violation of reasonable regulations of the exercise of the right of suffrage. *State ex rel. Orr v. Fawcett*, 17 Wash. 188, 49 Pac. 346; *Moyer v. Van de Vanter*, 12 Wash. 277, 41 Pac. 60, 50 Am. St. 900, 29 L. R. A. 670. Disqualification to hold office may be prescribed as a punishment for crime. *Barker v. People*, 3 Cowen 686, 704 *et seq.* Section 28 of the primary law does not infringe constitutional provisions guaranteeing the liberty of the press. 8 Cyc. 892. The *quo warranto* proceeding may be brought by a private individual without permission of court. Bal. Code, § 5780 *et seq; Mills v. State ex rel. Smith*, 2 Wash. 566, 27 Pac. 560; *State ex rel. Attorney General v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 68 Pac. 946, 70 Pac. 114. It cannot be instituted until the commencement of the term and some intrusion by the defendant; but taking office is such intrusion. 10 Am. & Eng. Ency. Law (2d ed.), 798; 2 Spelling, Extraordinary Remedies (2d ed.), § 1784; 17 Ency. Plead. & Prac., 407, note 2; Mechem, Public Officers, § 482; Throop, Public Officers, § 784. Where the ineligibility arises from prior misfeasance, there need not be any previous prosecution therefor, as a prerequisite to the institution of *quo warranto*, but the fact of such misfeasance may be inquired into fully in such proceeding. 2 Spelling, Extraordinary Remedies (2d ed.), § 1789. The information is in the same form as an ordinary complaint except that it is entitled in the name of the state on the relation of the claimant. *State ex rel. Heilbron v. Van Brocklin*, and *State ex rel. Attorney General v. Seattle Gas & Elec. Co., supra.*

Merritt, Oswald & Merritt, for respondent, contended that the constitution gives the legislature exclusive jurisdiction to determine contests, the only contests provided for by statute being those relating to precinct and county officers.

State ex rel. Fawcett v. Superior Court, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674; *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757. Article 3, § 3, of the constitution providing that the lieutenant governor shall serve for a term of four years and until his successor is elected and "qualified" was intended to obviate any inconveniences that might attend vacancies occurring between the expiration of the term of the incumbent and the qualification of his successor. *Stevens v. Wyatt*, 55 Ky. 542. The title of the act is insufficient to include the disqualifying provisions contained in section 28 of the primary law. *State ex rel. Nettleton v. Case*, 39 Wash. 177, 81 Pac. 554, 109 Am. St. 874, 1 L. R. A. (N. S.) 152; *State v. Tieman*, 32 Wash. 294, 73 Pac. 375, 98 Am. St. 854; *State v. Poole*, 42 Wash. 192, 84 Pac. 727; *State ex rel. Matson v. Superior Court*, 42 Wash. 491, 85 Pac. 264.

MOUNT, J.—This is an application to this court for a writ of *quo warranto* to oust the respondent from the office of lieutenant governor. The relator alleges, that the respondent was elected to the office of lieutenant governor at the general election held in November, 1908; that the votes were canvassed by the legislature as required by law, and respondent was declared duly elected, and on the second Monday of January, 1909, he duly qualified and is now holding the said office; that the respondent is incompetent to qualify or hold that office by reason of the fact that, prior to the primary election held on September 8, 1908, at which he was a candidate for the nomination of lieutenant governor on the republican ticket, he solicited and caused certain named newspapers to publish a statement consisting of the words " 'Paid Advertisement,' followed by a photograph of said M. E. Hay, said photograph being followed by the words 'M. E. Hay, candidate for the republican nomination for the office of lieutenant governor,' " and promised and agreed to pay, and did pay, such newspapers for such publications.

Respondent in opposing the writ presents several constitu-

tional questions, which need not be considered, in view of the construction which we place upon the statute relating to primary elections. Section 28 of the primary election law, Laws of 1907, page 472, upon which the relator relies, provides:

"No person shall be competent to qualify for any public office, who shall have, prior to the holding of any primary election, paid, or promised or agreed to pay, either directly or through another, or in any manner whatsoever, to the owner, publisher, manager or representative of any newspaper, any sum of money or other thing of value, for any article or published statement in a newspaper, wherein the electors are advised or counseled to vote for such candidate, or his fitness or qualifications for office are set forth, or his photograph or biography is published."

The language here is somewhat involved, and is no doubt susceptible of the construction urged by the relator, to the effect that the mere publication of a photograph with a statement telling whose photograph it is disqualifies a candidate from holding office. It may also be construed as contended for by respondent, viz., as prohibiting payment for the publication of "Any article or published statement in a newspaper wherein the electors are advised or counseled to vote for such candidate or his fitness or qualifications for office are set forth, or his photograph or biography is published." In other words, the photograph must be published in connection with the *published article or statement* where the voters are advised to vote for such candidate or his fitness or qualification for office is set forth. We think this construction must be adopted. The mere statement whom the photograph represents is not such an article or statement as is prohibited by the provisions above named.

The penalty for violating this statute is severe. It should not attach unless the meaning of the language is plain and the violation is clear. The attorney general, whose duty it is to advise public officers, gave an opinion on April 18, 1908,

construing the section of the primary law under consideration, in which opinion that officer said:

"That payment of money to a newspaper in the manner and for the purpose specified above, to wit: Publication of announcement of candidacy (with or without accompanying photograph) over the signature of the candidate, but without newspaper comment, does not render that candidate incompetent for public office." Report Attorney General, 1908, p. 446, Opinion No. 343.

We do not cite this opinion as controlling upon this court, but merely to show that § 28 does not clearly make the publication of a photograph a disqualification for office. It also shows that the respondent acted in good faith. Under these conditions, where the statute is construed by an officer whose duty it is to advise public officers, and where persons advised or with knowledge of such advice follow the same, the statute should not be construed otherwise unless the language is clear and unambiguous. The following section of the statute, viz., § 29, makes it a misdemeanor for any newspaper or other publication to accept money for advocating the election or defeat of any candidate, and then provides:

"Nothing herein shall prevent any person or persons, firm or corporation engaged in the publication of any newspaper, magazine or periodical from receiving for publication and publishing any matter, article or articles advocating the election or defeat of any candidate or candidates and receiving a consideration therefor, if such articles so published or printed have placed at the beginning thereof in plain type of black-faced Roman capitals in a conspicuous place, the statement 'Paid Advertisement.' But this section shall not be construed as permitting the payment for any publication prohibited by section 28 of this act."

The word "*publication*" here used refers clearly to the words "article or published statement" used in § 28. The object of § 29 is to prevent the newspapers named from advocating for secret hire the election or defeat of any candidate, but newspapers are authorized to openly sell their space where the readers are advised of the fact that the matter used is

an advertisement merely. The last clause of § 29 makes it clear that candidates themselves may not advocate their own election in newspapers by articles or statements which advise voters to vote for them, or where such articles set out their qualifications for office. But we think these sections are not intended to disqualify a candidate who merely publishes his picture with the statement whom the picture represents.

With this construction of the statute, it is unnecessary to consider the other questions presented. The writ must therefore be denied.

CROW, J., concurs.

DUNBAR, J. (concurring)—I concur for the reason that the statute is so cloudy and its meaning so uncertain that I do not think it would be just to impose so severe a penalty as the loss of office upon one who might chance to misinterpret its provisions.

GOSE, J., concurs with DUNBAR, J.

RUDKIN, C. J. (dissenting)—I regret my inability to agree with the conclusion announced by the majority of the court in this case, and the importance of the questions involved calls for, or at least justifies, a brief statement of the reasons for my non-concurrence. The opinions of the majority are based upon the ground that the direct primary law, so-called, does not prohibit the acts committed by the respondent, and does not render him incompetent to qualify for the office to which he has been elected; or, more properly speaking perhaps, upon the ground that the language of the act is so obscure and cloudy and the penalty so severe that a court should not enforce the penalty which follows as a matter of course upon its violation. The only provisions of the act which have any special bearing upon the question under consideration are §§ 28 and 29, which read as follows:

"Sec. 28. No person shall, in order to aid or promote his own nomination to a public office under the provisions of this act, or any amendment thereto, directly or indirectly, him-

self or through another person, give, pay, expend or contribute, or promise to give, pay, expend or contribute any money or other valuable thing, except for personal expenses. The words 'personal expenses,' as used in this act, shall include only expenses directly incurred and paid by a candidate for traveling and for purposes properly incidental to traveling, and for writing, printing and perparing for transmission any letter, circular or other publication not issued at regular intervals, whereby he states his position or views upon public or other questions; for stationery and postage, for telegraph, telephone and public messenger service, and for other similar expenses, and for the necessary expense of hiring halls or other rooms for the purpose of holding meetings to address the voters and others upon public questions and matters relating to his candidacy.

"No person shall be competent to qualify for any public office, who shall have, prior to the holding of any primary election, paid, or promised or agreed to pay, either directly or through another or in any manner whatsoever, to the owner, publisher, manager or representative of any newspaper, any sum of money or other thing of value, for any article or published statement in a newspaper wherein the electors are advised or counseled to vote for such candidate, or his fitness or qualifications for office are set forth, or his photograph or biography is published.

"Sec. 29. It shall be unlawful for any owner, proprietor, editor, manager, officer, clerk, agent, reporter, or employee of any newspaper,magazine or periodical printed or published in this state, to take, accept, or receive, or agree to take, accept or receive, for himself or any other person, or persons, firm or corporation, either by himself or any other person, persons, firm or corporation, any money, gratuity or other valuable consideration or article of value for or on account of or as a consideration for such newspaper, magazine or other periodical supporting or advocating the election or defeat of any candidate or candidates at any primary election. Any such owner, proprietor, editor, manager, officer, clerk, agent, reporter or employee of any newspaper, magazine or other periodical violating the provisions of this act shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than $25 and not more than $500 or confined in the county jail not less than 10 days or more than six months or be pun-

ished by both such fine and imprisonment: *Provided, however,* Nothing herein shall prevent any person or persons, firm or corporation engaged in the publication of any newspaper, magazine or periodical from receiving for publication and publishing any matter, article or articles advocating the election or defeat of any candidate or candidates and receiving a consideration therefor, if such articles so published or printed have placed at the beginning thereof in plain type of black-faced Roman capitals in a conspicuous place, the statement 'PAID ADVERTISEMENT.' But this section shall not be, construed as permitting the payment for any publication prohibited by section twenty-eight of this act." Laws 1907, pp. 472, 473.

The language of these sections may be somewhat involved, as suggested in the majority opinions, but when the act is read in its entirety and construed as a whole, its meaning is plain and obvious. Section 28 declares in express terms that no person shall be competent to qualify for a public office who shall have paid to the owner or publisher of a newspaper any sum of money for any article or published statement wherein his photograph or biography is published, and it is very apparent to my mind that a statement that the respondent was a candidate for the office of lieutenant governor on the republican ticket, accompanied by his photograph, is a published statement wherein his photograph is published, within the intent and meaning of the act. The majority say that the published article or statement must advise or counsel the electors to vote for the candidate, or set forth his fitness or qualifications for office, as well as publish his photograph or biography, before it comes within the prohibition of the statute; but this view is, in my opinion, manifestly erroneous, for at least two reasons. In the first place, the publication of an article or statement advising or counseling the electors to vote for a candidate, or setting forth his fitness or qualifications for office, without more, is a plain and palpable violation of the act and works a forfeiture of the office, and it would be an idle formality for the legislature to provide that such acts,

when accompanied by the publication of the candidate's biography or photograph, would have the like but no greater effect. In the second place, to permit a candidate for office to pay for the publication of his photograph accompanied by a statement of the office to which he aspires, in a newspaper published at regular intervals, is in direct violation of the provision of the first part of § 28, which prohibits a candidate from paying or contributing money to promote his candidacy except for personal expenses, and defines "personal expenses" in a manner that of necessity excludes the expenditures made by the respondent in this case.

The claim is advanced that the provisions of § 28 are in a measure nullified, or at least rendered obscure, by the provisions of § 29. I am unable to discover the slightest conflict between the two sections. The former is directed solely against the offending candidate and provides a penalty for its violation. The latter is directed solely against the offending newspaper and provides a penalty of a different kind for its violation. Furthermore, the last clause of § 29 contains this express provision: "But this section shall not be construed as permitting the payment for any publication prohibited by section twenty-eight of this act;" and, as we have seen, the publication in question is twice prohibited by § 29.

Reference is made in the majority opinion to an opinion of the attorney general of this state, but I deem this of no consequence. The opinion of that officer cannot obscure a statute which is otherwise plain, though it may elucidate a statute which is otherwise obscure. Furthermore, the attorney general is only required by law to give written opinions to the governor and other state officers on legal and constitutional questions relating to the duties of their respective offices, or to either branch of the state legislature or committees thereof on constitutional or legal questions, when requested so to do. Bal. Code, § 169 (P. C. § 8379). An opinion of the attorney general, not authorized or required by law, stands upon no different footing from the advice of any other counsel, and

cannot be looked to or considered by a court in construing a public statute of the state. The will of the people as expressed at the polls should ordinarily prevail, but the mode of exercising that will is regulated and controlled by the constitution and laws of the state, and when there is a conflict between the two, the latter must prevail.

Inasmuch as the majority opinion fails to consider other objections urged by the respondent, I will not allude to them, further than to say that I find them without substantial merit.

The writ should issue as prayed.

FULLERTON, J., concurs with RUDKIN, C. J.

CHADWICK, J. (concurring)—Assuming § 28 of the primary law to be constitutional, I agree with all that has been said by Judge Rudkin. I believe it to be susceptible of construction, and that it does not conflict with § 29. I do not agree with the reasoning of Judges Mount and Crow, nor with the special reasons assigned by Judges Dunbar and Gose for their concurrence. Inasmuch as a majority of the court have decided that the writ shall not issue, it is perhaps idle to pursue the discussion, but because of the importance of this case, I feel that I am not unwarranted in expressing my reason for believing that the writ should be denied.

Section 28 of the act attempts to put restrictions upon the eligibility of the candidate that are not warranted by the constitution. It provides that a candidate offending against its provisions shall not be competent to qualify for the office to which he may have been elected. Eligibility of executive officers has been defined by the constitution of the state: "No person except a citizen and a qualified elector of this state shall be eligible to hold any state office," etc. Art. 3, § 25. In other words, the people have said that any one of their number who is a citizen of the United States and a qualified elector shall be eligible to hold the office of lieutenant governor. There is no qualification prescribed by statute for the elector that would bar the respondent in this case from assuming the

duties of the office to which he has been elected. Bal. Code, §§ 1320-1324 (P. C. §§ 4768-4771). Section 28 of the direct primary law clearly puts upon the citizen a test of eligibility not contemplated by the people when adopting the constitution. Although the respondent published an article or statement prohibited by § 28, this cannot be made, by mere statutory enactment, a disqualification, for the constitution leaves no room for such action on the part of the legislature. Many states have passed corrupt practice acts and made the expenditure of money by a candidate, beyond certain prescribed limits, a misdemeanor or a ground of contest, or have deprived the candidate of the emoluments of the office. These laws have generally been sustained. But any attempt to add additional qualifications or to impose any limitations on the terms of eligibility fixed by the constitution has found no favor except in two instances, to which I shall refer:

"Hence, whenever any public office of any kind is made elective, . . . the constitution becomes *ex proprio vigore* applicable and operative, and fixes the qualifications for eligibility. This is a denial of power to the legislature to impose any greater restrictions or to add other qualifications for eligibility to these prescribed by the constitution." *State ex rel. Childs v. Holman*, 58 Minn. 219, 59 N. W. 1006.

The constitution of the state of Minnesota provides that any person having the qualifications of a voter shall be eligible to office. In the old case of *Barker v. People*, 3 Cowen 686, it is said, in discussing the principle which I conceive to be involved here:

"Eligibility to public trusts is claimed as a constitutional right, which cannot be abridged or impaired. . . . The constitution giving the right of election and the right of appointment; these rights consisting essentially in the freedom of choice; and the constitution also declaring, that certain persons are not eligible to office; it follows from these powers and provisions, that all other persons are eligible. Eligibility to office is not declared as a right or principle, by any express terms of the constitution; but it results, as a just deduction,

from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities, to choose and to appoint, any person, who is not made ineligible by the constitution. Eligibility to office, therefore, belongs, not exclusively or specially to electors, enjoying the right of suffrage. It belongs equally, to all persons whomsoever, not excluded by the constitution. I therefore conceive it to be entirely clear, that the legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications, which the constitution has not required."

See, also, McCrary, Elections, § 312; Mechem, Public Officers, § 96; *Thomas v. Owens*, 4 Md. 189.

In the case of *Page v. Hardin*, 8 B. Mon. (Ky.) 648, it was held that a statute requiring the secretary of state to reside at the seat of government could not work a forfeiture of the office in the face of a constitutional provision saying that he might hold the office for a prescribed term, "if he shall so long behave himself well." The supreme court of Ohio, *State ex rel. Attorney General v. Covington*, 29 Ohio St. 102, and the supreme court of Colorado, *Darrow v. People*, 8 Colo. 417, under constitutional provisions like our own, in that they say "No person shall be elected," etc., have held that this statement, being in the negative form, could not be taken as an inhibition upon the power of the legislature to add such *reasonable* qualifications as it deemed necessary in order to ensure an efficient and proper discharge of the office and, I may add, to ensure an incumbent who has the interest of a taxpayer in the execution of his trust. The rule adopted by these courts is as follows:

"We do not believe that the framers of the constitution, by this provision, intended to say that the right to vote should be the sole and exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualifications should ever be demanded, and no other disqualifications should be imposed. If, as has been well said, they 'had intended to take away from the legislature the power to name disqualifications for office, other than the one

named in the constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration.' *State ex rel. Attorney General v. Covington*, 29 Ohio St. 102." *Darrow v. People*, *supra*.

I am not willing to admit this to be the better rule, but if it be the rule, it in no wise militates against my attitude toward the case at bar. It cannot be denied that, if the legislature has power to add other qualifications to those fixed in the constitution, they must be *reasonable*. It must be within the spirit if not the letter of the constitution. Now, is the provision that one who publishes an article or statement, as provided in section 28, a reasonable one? It cannot be so held. It does not go either to the character, capacity, sex or age of the candidate or his pecuniary interest in the affairs of state. It puts a test of eligibility ("he shall not be competent to qualify") upon the successful candidate unknown to the law, and in no way tending to safeguard the privilege of the public to select officials possessing some recognized standard of fitness. The condition is arbitrary and unreasonable. It does not pertain to the citizenship or mental or moral worth of the candidate. Therefore, in construing the constitutional provision, whether it be held that the legislature can add no qualification, or may add such reasonable qualifications as are not excluded by necessary implication, it makes no difference. Under the first construction, the respondent is entitled to his office; under the second, he cannot be denied, for the reason that the added qualification is neither reasonable or necessary to the faithful and competent administration of his office. Upon either theory section 28 violates section 25, art. 3, of the constitution.

The writ should have been denied for the reasons herein suggested.

[No. 7463. Decided February 8, 1909.]

A. WEINBERG, *Respondent*, v. G. NAHER *et al.*, *Appellants*.[1]

MORTGAGES—MATURITY OF DEBT—OPTION TO DECLARE WHOLE DEBT DUE—WAIVER—TENDER OF OVERDUE PAYMENT. An option in a mortgage note to declare the whole debt due for default in payment of interest cannot be exercised after lawful tender of an overdue interest installment.

LIMITATION OF ACTIONS—TIME—ACCRUAL OF RIGHT OF ACTION. Failure to pay an installment of interest, under a clause authorizing the payee to declare the whole debt due, does not start the running of the statute of limitations.

SAME—EXERCISE OF OPTION—NOTICE—SUFFICIENCY. Letters stating that a loan will be called in if the mortgagor does not in a week further secure the loan by an insurance policy, and that the mortgagee will insist on the policy or call in the loan, do not amount to an election to declare the whole sum due on account of default in the payment of interest.

TENDER—CONDITIONS—WAIVER OF OBJECTIONS. Where at the time a tender of interest was made through a payment to a bank, coupled with a request that the mortgagee call and receive it, the mortgagee, in writing, gave as his only reason for refusing the tender, that the interest was past due, he cannot afterwards object that the tender was not lawful because coupled with a condition and not made to him personally.

TENDER—NECESSITY. A formal tender is excused where it appears that it would be refused.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 28, 1908, upon findings in favor of the plaintiff, in an action to foreclose a mortgage. Reversed.

Fred H. Peterson and *H. C. Force*, for appellants.

Richard Saxe Jones and *Jas. A. Snoddy*, for respondent.

FULLERTON, J.—On January 16, 1907, the respondent loaned to the appellants the sum of $12,000, to become due three years after date, with interest at six per cent per an-

[1]Reported in 99 Pac. 736.

num, payable semi-annually. The note taken to evidence the loan provided that, in case the interest was not paid when due, the whole sum of both principal and interest should become immediately due, at the option of the holder of the note. At the time of the making and delivery of the note, and to secure the payment thereof according to its terms and conditions, the appellants also executed and delivered to the respondent a mortgage covering real property situated in the city of Seattle. The mortgage contained, among others, the following conditions:

"But in case default be made in the payment of the principal or interest of said promissory note, or any part thereof, when the same shall become due and payable, according to the terms and conditions thereof, then the said party of the second part . . . are hereby empowered to sell the said premises . . . and out of the money arising from such sale to retain the whole of said principal and interest, whether the same shall be then due or not, together with the costs and charges of making such sale . . .."

By the terms of the note, an installment of interest amounting to $360 became due on July 16, 1907, which was not paid. This is an action brought by the respondent to foreclose the mortgage because of the nonpayment of this interest installment. There is no serious controversy over the facts. Mr. Naher, one of the appellants, testified that, on the day preceding the maturity of the interest payment, he called up the respondent by telephone, telling him that the interest on the note fell due the next day, and inquired when he could meet him personally for the purpose of paying it; that the respondent stated in answer that he might mail a check for the amount; that he again said that he wanted to see him personally as he wanted the payment indorsed on the note; that to this the respondent repeated his directions to send the check by mail. That on the next day he went to the respondent's place of residence to pay him the money, but was unable to find him; and between that time and July 30, he made

repeated inquiries for him at his place of residence, at one of which times he left his telephone number with the request that Mr. Weinberg call him up, but he was unable to find him at any of these times, and did not receive any telephone call from him, and did not hear from him until the 30th of the month. The record further shows that on the 30th of July the respondent wrote Mr. Naher the following letter:

"Seattle, July 30, '07.

"Mr. G. Naher, Seattle, Wash.

"D Sir: I hereby notify you that unless you will before the end of this week make insurance policy payable to me shall call on you for principal & interest at once. Yours truly, A. Weinberg."

To this letter some response was made which is not shown by the record, and on August 1, 1907, the respondent wrote again as follows:

"Seattle, August 1, 1907.

"Mr. G. Naher, 702 17th St., Seattle.

"Dr. Sir: Yours to hand. You well know the note & mort. were made to me and are in my possession at all times & as said before I will insist on insurance policy or call entire loan & interest due. Yours respf. A. Weinberg."

August 5, 1907, Mr. Naher left the amount of the interest with the Puget Sound National Bank of Seattle, who notified Mr. Weinberg of the deposit of the money by letter, in which letter he was requested to call and bring the note that the money might be handed him and the payment indorsed on the note. The respondent responded to this notice by writing thereon the following: "Interest on note past due therefore refuse to accept same. A. Weinberg."

Two days following, the respondent sent a formal letter to the appellants electing to exercise his option to declare the whole sum of principal and interest due for the failure to pay the installment of July 16, 1907. Later on he placed the notes and mortgage in the hands of his attorney for collection, who demanded payment of the entire debt. Answering

this demand, the appellants tendered the interest, which was refused. This foreclosure proceeding was then begun, whereupon the appellants paid the interest into court at the time they filed their answer. At the trial, after the foregoing facts had been shown, the court held that the respondent had rightfully exercised the option given him in the mortgage note to declare the whole sum due and payable, and entered a decree foreclosing the mortgage. This appeal is from the judgment so entered.

The principal questions suggested by the record, and debated by the parties, are two, namely: whether a lawful tender of the interest in default by the appellants to the respondent prior to the time the respondent elected to declare the whole sum of principal and interest due and payable would cut off the right of the respondent to declare the entire debt due payable; and whether there was in fact such a tender.

Taking up these questions in their order, we are clear that, on a contract of the character in question here, a payment or a tender of payment of the overdue interest before the option to declare the whole debt due has been exercised cuts off the right to exercise the option. This must follow, we think, from the nature of the contract. The debt does not become due on the mere default in the interest payment. Some affirmative action is required, some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due. This exercise of the option may of course take different forms. It may be exercised by giving the payors formal notice to the effect that the whole debt is declared to be due, or by the commencement of an action to recover the debt, or perhaps by any means by which it is clearly brought home to the payors of the note that the option has been exercised before the interest is paid or tendered. After a tender or payment there is no interest due, and the right to exercise the option has its foundation in the fact that interest remains due and unpaid.

But it is said that the holder of the note has a reasonable

time in which to exercise the option after default is made, and the right cannot be cut off by payment or tender of payment before this reasonable time expires. This, however, is not what is meant by the authorities when they speak of a reasonable time in which to exercise the option. It was formerly thought that, inasmuch as the option was in the nature of a forfeiture, and that as forfeitures were not favored, the right must be exercised at once else it was deemed waived, and this even though the default continued. But later this was deemed too harsh a rule, and a reasonable time was given, where the default continued, in which the option could be exercised, but it was not meant to be asserted that the option outlived the default.

Our attention has not been called to many cases where this precise question has been discussed, but a case in point is *Sykes v. Arne* (Cal.), 47 Pac. 868. That was a suit brought to foreclose a chattel mortgage. The mortgage debt was payable in installments, and a clause in the mortgage gave the mortgagee the right on the mortgagor's default in the payment of any installment as it fell due to declare the whole debt due and payable. Default in the payment of an installment was made, but before the mortgagee elected to proceed, a tender was made of all that was actually due. The court held that the tender cut off the mortgagee's right to exercise the option, holding that when "the entire debt may be treated as due upon any default in payment of interest or other installment, at the election of the mortgagee or trustee, the whole debt is nevertheless not due until the election has been exercised."

In *Ver Planck v. Godfrey*, 42 App. Div. 16, 58 N. Y. S. 784, the mortgage provided that the whole of the principal debt should become due at the option of the mortgagee on "default in the payment of any tax or assessment for sixty days." The taxes on the mortgaged premises were allowed to remain delinquent for more than sixty days, but were paid before the mortgagee began foreclosure proceedings, but

after notice sent the mortgagor that she had elected to exercise her option. The court held that the payment was a defense to the foreclosure proceedings. The mortgagor had deposited with the agent of the mortgagee money which she claimed was for the purpose of paying these taxes, and this fact may have influenced somewhat the holding of the court, but the case upholds the principle that a tender of payment before an actual exercise of the option cuts off the right of election. To the same effect is *Lowenstein v. Phelan*, 17 Neb. 429, 22 N. W. 561.

That such a clause in a mortgage and a breach thereof does not make the mortgage due for the purpose of starting the running of the statute of limitations has been repeatedly held. 13 Am. & Eng. Ency. Law (2d ed.), 793, note 1. Such is the rule in this state. *First Nat. Bank v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. 828; *White v. Krutz*, 37 Wash. 34, 79 Pac. 495. Another case in point from this state on the principle involved is *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822. In that case the plaintiffs sued to enforce the specific performance of a contract to convey land. The contract on which the suit was based provided for the payment of the purchase price in installments, and time was made the essence of the contract. These installments were not all paid as they fell due, but those owing were tendered before the final payment fell due and before any forfeiture was declared, and were paid into court on the commencement of the suit. It was urged that this did not save the forfeiture; that in order to recover, the plaintiffs must prove that all of the payments due under the contract up to the time of the final tender were paid or tendered at the time they fell due, as time was made of the essence of the contract, and a forfeiture occurred as of course on default of any payment. Answering this objection the court said:

"We cannot so construe the contract. This clause in the contract did not, of itself, forfeit the contract in equity simply because a payment was not made immediately on its falling

due. Undoubtedly the party agreeing to make the sale could declare a forfeiture, and cut off the right of the other party to make the payments, but it required some affirmative action on his part. If he remained passive until the other party made tender of payment, he was obligated to accept it and to perform his part of the contract."

The only case cited to us which directly holds the contrary of the conclusion reached by us is *Swearingen v. Lahner*, 93 Iowa 147, 61 N. W. 431, 57 Am. St. 261, 26 L. R. A. 765; but as we believe it contrary to the better reason as well as the weight of authority, we must decline to follow it.

As to the second question we are of the opinion that there was a tender of the overdue interest prior to the time the mortgagee elected to exercise the option given him to declare the whole sum of principal and interest due. The letters of June 30 and August 1, 1907, do not amount to such an election. The language of the first is that the loan will be called in if the mortgagor does not before the end of the week make the insurance policy on the property payable to the mortgagee; and the second is that the mortgagee will insist on an insurance policy or call in the loan. These letters but threaten an exercise of the option, and are evidently made for the purpose of procuring additional security for the loan. They do not amount to an actual call of the loan, or to an exercise of the option. That this is their meaning is evidenced by the subsequent act of the mortgagee. On the sixth day after mailing the last letter he sent a letter to the mortgagor in which he gave notice that he had elected to declare the whole debt due and payable. If he had thought that his earlier letters amounted to such a declaration he would not have felt the necessity of sending the later one. But prior to the time of the sending of the later notice, the mortgagors tendered the interest payment through the bank. It is objected to this tender that it was not sufficiently formal; that the mortgagors did not seek out the mortgagee, produce the money and make an actual offer of it to him; that the letter was nothing more

than a mere offer to pay if the mortgagee would call at the bank for it; and that the offer as made was coupled with a condition which the mortgagors had no right to exact. If these objections had been made at the time of the tender, and not overcome by a more formal tender, or if the refusal to accept had been made without giving a reason, doubtless the tender would have been insufficient. But the rejection was not made for any of the reasons here given. The reason for the refusal to accept the money was stated in writing and was that the interest was past due. This being the reason given, and the only reason given, the mortgagee is bound by it, and the right to refuse the tender must be tested by the sufficiency of that reason. *Zeimantz v. Blake, supra.* In the latter case this language was used:

"It is complained in this connection that the tenders were insufficient, but we think the appellant is estopped to complain of this. Had he refused to perform the contract because he had not been tendered payment in full, and appeared in the action and defended on that ground, he probably could have succeeded in defeating a recovery of costs against him, if his contention should have proven true, though not the performance of the contract. But the appellant did not object to the tender when made on the ground that enough was not tendered him, nor did he defend this action on that ground. He denied any liability whatsoever under the contract, and it is on that ground that he must succeed now, if he succeeds at all."

That the reason given for refusing to accept the interest was insufficient needs no further demonstration.

A formal tender was unnecessary for a further reason. The answer to the note from the bank makes it manifest that a formal tender would have been refused. This by all of the modern cases is a sufficient reason for not making a tender, on the principle that the law does not require one to do vain or useless things. *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609; 28 Am. & Eng. Ency. Law (2d ed.), p. 5.

We conclude, therefore, that the court was in error on al-

lowing a foreclosure of the mortgage. The judgment appealed from will be reversed, and the cause remanded with instructions to enter a judgment in favor of the defendants to the effect that the plaintiff take nothing by his action, and that the defendants have judgment for costs against him.

DUNBAR, MOUNT, and CROW, JJ., concur.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., took no part.

[No. 7622. Decided February 9, 1909.]

J. A. SUMPTER, *Respondent*, v. H. A. BURNHAM *et al.*, *Appellants*.[1]

PLEADING—ANSWER—DENIAL ON INFORMATION. A denial, on information and belief, as to the filing of a lien notice in the county auditor's office is insufficient.

LOGS AND LOGGING—LIENS—PLEADING—ANSWER—ADMISSIONS—ISSUES AND PROOF. In an action to foreclose a logger's lien, an answer setting up a tender "at the time of the filing of the lien" and plaintiff's failure to make a demand before such filing, dispenses with plaintiff's proof of the filing of the lien, which defendant had denied on information and belief.

SAME—FORECLOSURE—COSTS—DEMAND BEFORE SUIT—STATUTES—CONSTRUCTION. Under Laws 1899, p. 143, which forbids costs to holders of logger's liens who begin suit before demand for payment, unless the court shall find that the claimants had reasonable ground to believe that the owner was attempting to defraud the claimant, a demand before the filing of the lien will entitle the claimant to costs.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered May 4, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to foreclose a logger's lien. Affirmed.

Troy & Sturdevant, for appellants.

P. C. Kibbe, for respondent.

[1]Reported in 99 Pac. 752.

RUDKIN, C. J.—This action was instituted to foreclose a logger's lien. From a judgment in favor of the plaintiff, the defendants have appealed, assigning the following errors as grounds for reversal: (1) Error in granting judgment of foreclosure, because the lien claim was denied in the answer and the respondent offered no proof of its execution or filing; (2) error in awarding the respondent costs of foreclosure, because no demand for payment was made after the filing of the lien claim and before suit; and (3) error in refusing to find that the appellants tendered the full amount due before the action was commenced.

(1) The complaint in its sixth paragraph alleged the filing of the lien notice in the office of the county auditor of Thurston county, setting forth a copy. The answer denied this allegation on information and belief; but "A party cannot plead ignorance of a public record to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the fact." 1. Ency. Plead. & Prac., p. 813, and cases cited. *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144. Furthermore, the answer alleged affirmatively "that at or about the time of the commencement of the above entitled action and the filing of the lien herein, the defendant H. A. Burnham tendered to the plaintiff $66.60, the total amount due said plaintiff, which tender was refused by the said plaintiff." Also, "that the plaintiff at no time made any demand on the defendant . . . subsequent to the filing of the lien claim and prior to the commencement of the above entitled action." Under these pleadings a formal tender of the lien notice in evidence was unnecessary, especially in view of the fact that no specific objection to the absence of such proof was made until after a decision in the case was announced.

(2) The second assignment of error is based on § 1 of the act of March 13, 1899, Laws of 1899, p. 143, which reads in part as follows:

"That in no action brought under the provisions of this act shall costs be allowed lien holders unless a demand had been made for payment of his lien claim before commencement of suit, unless the court shall find the claimants at time of bringing action had reasonable grounds to believe that the owner or the person having control of the property upon which such lien is claimed was attempting to defraud such claimant, or prevent the collection of such lien."

The manifest purpose of this section is to enable parties against whom liens may be asserted to settle the claims before being mulcted in costs, and a demand before filing the lien notice will subserve the same purpose as a demand made at a later day. True, the statute uses the terms "lien holder" and "lien claimant" but in a general sense a party who holds a lienable claim is a lien claimant, and a claim that may be perfected by filing a proper notice under the statute is a lien claim. We think the construction placed on this section by the court below is in accordance with its spirit and does no violence to its letter.

The last assignment presents a question of fact upon which the testimony is conflicting, and we see no reason why we should disturb the finding of the court below. There is no error in the record, and the judgment is affirmed.

CHADWICK, FULLERTON, CROW, and MOUNT, JJ., concur.

[No. 7723. Decided February 9, 1909.]

F. H. WEINGARTEN *et al.*, *Appellants*, v. ALICE O. SHURTLEFF *et al.*, *Respondents*.[1]

BOUNDARIES—ADVERSE POSSESSION—MISTAKEN BOUNDARY LINE—EVIDENCE—SUFFICIENCY. Where, at the time of a sale of lots, the grantor marked the line upon the ground, open, notorious and exclusive possession by the grantee with reference to such line, upon which he built a substantial fence, claiming the same as the true dividing line, for more than ten years, confers title by adverse possession to the line, which included a three-foot strip of the adjoining lot.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 11, 1908, in favor of the defendants by direction of the court, after a trial before the jury, in an action of ejectment. Affirmed.

E. L. Culver (*F. Campbell*, of counsel), for appellants.
Lueders & Phelps, for respondents.

RUDKIN, C. J.—This was an action of ejectment to recover possession of lot three, in block 31, of Puget Park Addition to the city of Tacoma. But while the entire lot was involved, under the allegations of the complaint, the real controversy was over a strip of land about three feet in width lying along the easterly side of the lot. There is no substantial dispute over the material facts. The plaintiffs are the owners of lots three and four in the above block, under mesne conveyances from Samuel Bertelson and wife. The defendants are the owners of lots one and two in the same block, under mesne conveyances from the same grantors. Lot two lies immediately east of lot three. George A. Libbey and wife purchased lots one and two from Bertelson and wife about the year 1893. At or about the time of acquiring title, Libbey and Bertelson,

[1]Reported in 99 Pac. 739.

his grantor, measured off lots one and two on the ground, and marked the boundary line between lots two and three by driving a nail in the sidewalk at the front of the lots and placing a stake at the rear. Whether Bertelson had parted with his title to lots three and four prior to this does not clearly appear, but in any event he had owned all four lots up to about that time.

After the line was thus established, Libbey built a barn on lot two, with reference to the line, and constructed a substantial lattice fence on the line from the corner of the barn to a point about midway of the lot. From the end of the fence to the street line, the lot was graded and planted to grass. Ever since the line was thus established in 1893, Libbey and his successors in interest have at all times been in the open, notorious, and exclusive possession of lot two claiming up to the line thus established. The plaintiffs acquired title to lots three and four shortly before the commencement of this action, and caused a survey to be made for the purpose of locating the easterly line of lot three, or the dividing line between lots two and three. The surveyor located the new line approximately three feet east of the line theretofore established by Bertelson and Libbey, thus bringing within the limits of lot three the fence and a portion of the barn theretofore constructed by Libbey on what he supposed to be lot two. This action was thereupon instituted to recover possession of the whole of lot three, but, as stated above, the only controversy was over the strip lying between the two disputed lines. At the close of the testimony, the court withdrew the case from the consideration of the jury and directed a judgment in favor of the defendants. From this judgment the plaintiffs have appealed.

Substantially this same question has been before this court in a number of appeals, some of which were from the same county, and we think that the testimony without any substantial contradiction warranted the action taken by the trial court. While the numerous deeds under and through

which the respondents claim title only purport to convey lots one and two, it nevertheless, clearly appears that the respondents and their predecessors in interest have at all times claimed that the dividing line between the two lots was the line established and marked by Libbey and Bertelson, that they have claimed up to that line for much more than the statutory period, and that their possession has been open, notorious, exclusive, adverse, and under claim of right. *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936; *Suksdorf v. Humphrey*, 36 Wash. 1, 77 Pac. 1071; *Wilcox v. Smith*, 38 Wash. 585, 80 Pac. 803; *Noyes v. Douglas*, 39 Wash. 314, 81 Pac. 724; *Lindley v. Johnston*, 42 Wash. 257, 84 Pac. 822; *Thornley v. Andrews*, 45 Wash. 413, 88 Pac. 757.

There is no error in the record, and the judgment is affirmed.

CHADWICK, FULLERTON, CROW, MOUNT, and DUNBAR, JJ., concur.

[No. 7751. Decided February 9, 1909.]

J. L. BLALOCK, *Appellant*, v. H. C. CONDON *et al.*, *Respondents.*[1]

PLEADING—DEMURRER — RENEWAL AFTER ANSWER — DISCRETION. After overruling a demurrer to a complaint, and answer over by the defendants, it is discretionary to permit a renewal of the demurrer.

LIMITATION OF ACTIONS—TIME WHEN ACTION IS COMMENCED—STATUTES—CONSTRUCTION. Under Bal. Code, § 4807, which provides that the statute of limitations shall apply to actions brought by the state and municipalities, and that an action shall be deemed commenced when the complaint is filed, actions brought by private parties are not deemed commenced until the complaint is filed.

STATUTES—SUBJECTS AND TITLES—AMENDMENTS—LIMITATION OF ACTIONS. Laws 1903, p. 26, being an act relating to limitations in actions brought by the state and municipalities amending Bal. Code, § 4807, is not broad enough to embrace the provision of § 4807 that an action shall be deemed commenced when the complaint is filed.

[1]Reported in 99 Pac. 733.

SAME. The title of an amendatory act referring to the act amended merely by its number is not sufficient.

SAME—REPEALS—IMPLIED REPEALS—LIMITATION OF ACTIONS. Laws 1903, p. 26, entitled an act relating to limitations in actions brought by the state and municipalities, amending Bal. Code, § 4807, without reference to a repeal of other statutes, and containing no repealing clause, does not repeal by implication that part of § 4807 which provides that an action is deemed commenced when the complaint is filed.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 22, 1908, in favor of the defendants, upon sustaining a demurrer to the complaint, dismissing an action on a promissory note. Affirmed.

John L. Rockwell, Caldwell & Riddell, and *James E. Burdett*, for appellant.

Higgins, Hall & Halverstadt, for respondents.

RUDKIN, C. J.—This action was instituted to recover the balance due on a promissory note for the sum of $3,304.31, bearing date July 23, 1897, and payable on demand. The complaint alleged the execution and delivery of the note by the defendants, that the sum of $800 had been paid thereon on the 5th day of September, 1901, and that no other or further payments had been made. The action was commenced by personal service of summons and complaint on the 3d day of September, 1907, but the complaint was not filed in the office of the clerk of the superior court until the 11th day of November, 1907. The defendants appeared and demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, and on the further ground that the action was not commenced within the time limited by law. The demurrer was overruled, and the defendants answered over. Afterwards the court permitted the defendants to renew their demurrer, and upon further argument the demurrer was sustained on the second ground specified. The plaintiff refused to plead further, and

judgment of dismissal was entered from which this appeal is prosecuted.

In support of his appeal, the appellant contends that the court erred in permitting the respondents to renew their demurrer after answer, and in sustaining the demurrer and dismissing the action. The court clearly acted within its discretion in permitting a renewal of the demurrer after answer. *Roche v. Spokane County*, 22 Wash. 121, 60 Pac. 59; *McClaine v. Fairchild*, 23 Wash. 758, 63 Pac. 517; *Thomas v. Price*, 33 Wash. 459, 74 Pac. 563, 99 Am. St. 961.

If the action was not commenced within the purview of the statute of limitations until the complaint was filed, the demurrer was properly sustained, as more than six years had elapsed between the date of the maturity of the note and the last payment and the date of filing the complaint. If, on the other hand, the action was commenced by the service of summons and complaint, the demurrer should have been overruled, as the respondents were served within six years from the date of the last payment as averred in the complaint.

Bal. Code, § 4807 (P. C. § 291), provides as follows:

"The limitations prescribed in this chapter shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties. An action shall be deemed commenced when the complaint is filed."

This court has uniformly held that the last clause of this section applies to actions by private parties as well as to actions by the state or its municipal subdivisions, and that an action is not deemed commenced so as to toll the statute of limitations until the complaint is filed, though it may be deemed commenced for other purposes by the service of summons and complaint. *Cresswell v. Spokane County*, 30 Wash. 620, 71 Pac. 195; *Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553; *Service v. McMahon*, 42 Wash. 452, 85 Pac. 33.

Section 4807, *supra*, was amended at the legislative session

of 1903, Laws 1903, p. 26. The title and body of the amendatory act are as follows:

"An act relating to the defense of the statute of limitations in actions brought by or for the benefit of the state or any of its municipalities, amending section 35 of the Code of Civil Procedure of Washington, of 1881, the same being section 4807 of Ballinger's Annotated Codes and Statutes of Washington, and declaring an emergency.

"Section 1. Section 35 of the Code of Civil Procedure of Washington, 1881, the same being section 4807 of Ballinger's Annotated Codes and Statutes of Washington, shall be amended to read as follows: Section 35 (section 4807). The limitations prescribed in this act (chapter) shall apply to actions brought in the name or for the benefit of any county or other municipality or *quasi* municipality of the state, in the same manner as to actions brought by private parties: *Provided*, That there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: *And further provided*, That no previously existing statute of limitation shall be interposed as a defense to any action brought in the name of or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to the adoption of this act, nor shall any cause of action against the state be predicated upon such a statute. An action shall be deemed commenced when the complaint is filed."

The appellant contends that the last clause of § 1 of the amendatory act can have no application to actions by private parties for the reason that the title of the act is not broad or comprehensive enough to embrace that subject. In our opinion this contention must be sustained. Bal. Code, § 4807, as construed by this court embraces two separate and distinct subjects. First, a provision that the statute of limitations shall run against the state and its municipal subdivisions; and second, a provision that an action shall be deemed commenced when the complaint is filed, whether the action be instituted by the state or by private parties. The title of the

amendatory act is broad enough to embrace the first of these subjects, but not the second. The first part of the title, viz., "An act relating to the defense of the statute of limitations in actions brought by or for the benefit of the state or any of its municipalities," is clearly too narrow and restricted to admit of affirmative legislation fixing the time when an action by private parties shall be deemed commenced. The remainder of the title; namely, "amending section 35 of the Code of Civil Procedure of Washington, of 1881, the same being section 4807 of Ballinger's Annotated Codes and Statutes of Washington, and declaring an emergency," is not of itself a sufficient title to an amendatory act. *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. 831, and cases cited.

We are, therefore, of opinion that the act of 1903 does not fix the time when an action instituted by a private party shall be deemed commenced. But it does not follow from this that we have no statute on that subject other than the practice act of 1893, which provides that civil actions shall be commenced by the service of summons and complaint. If the title to the amendatory act of 1903 is not broad enough to embrace a provision amending § 4807, *supra*, in so far as that section relates to the commencement of actions by private parties, the title is not broad enough to authorize a repeal of so much of § 4807 as relates to that subject. In other words, the title of the act of 1903 makes no reference to a repeal of other statutes, the body of the act contains no repealing clause, and an act relating to the defense of the statute of limitations in actions brought by or for the benefit of the state or any of its municipalities, cannot repeal by implication an act which fixes the time when actions by private parties shall be deemed commenced. If, therefore, the time when an action instituted by private parties shall be deemed commenced, within the meaning of the statute of limitations, is not fixed by the amendatory act of 1903, the provision of § 4807 fixing such time is still in full force and effect.

The demurrer was properly sustained, and the judgment is affirmed.

GOSE, FULLERTON, CHADWICK, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7804. Decided February 9, 1909.]

TACOMA WATER SUPPLY COMPANY, *Appellant*, v. W. M. DUMERMUTH *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—CONTRACTS—CONCURRENT AGREEMENTS—FORFEITURE—TENDER OF CONVEYANCE. The terms of an agreement wherein the defendants were to purchase land of the state and convey a part to the plaintiff, who was to pay one-fourth of the price, are mutual, concurrent and dependent; and the defendants cannot claim a forfeiture without tender of conveyance after the title was acquired from the state.

SPECIFIC PERFORMANCE—EQUITY—LACHES—DELAY IN BRINGING SUIT. A delay of two or three months in bringing action for specific performance of a contract to convey land does not amount to laches barring the suit, where the value of the property is not uncertain and fluctuating.

VENDOR AND PURCHASER—CONTRACTS—COVENANTS—FORFEITURE FOR BREACH—DAMAGES. A contract by a vendee to build a sightly tank on the property purchased is collateral and not ground for forfeiture of the contract, the remedy for breach being an action on the covenant.

INTEREST—TENDER. Interest will not be allowed on purchase money due after sufficient tender of the sum due.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 17, 1908, in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for the specific performance of a contract to convey real estate. Reversed.

Fogg & Fogg, for appellant, contended that the delay on appellant's part was not so unreasonable as to amount to a

[1]Reported in 99 Pac. 741.

waiver of its right under the contract to specific performance. 6 Pomeroy, Equity Jurisprudence, § 810; *Parkin v. Thorold*, 16 Beavan 59; Ames, Equity Cases, p. 329; *Newell v. Lamping*, 45 Wash. 304, 88 Pac. 195; *Bower v. Bagley*, 9 Wash. 642, 38 Pac. 164; *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Maris v. Masters*, 31 Ind. App. 235, 67 N. E. 699; *Sanford v. Weeks*, 38 Kan. 319, 16 Pac. 465, 5 Am. St. 748; *Munroe v. Edwards*, 86 Mich. 91, 48 N. W. 689; *Vance v. Newman*, 72 Ark. 359, 80 S. W. 574, 105 Am. St. 42; *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352; *Hosmer v. Wyoming R. & Iron Co.*, 129 Fed. 883; 104 Am. St. 217, foot note; 12 L. R. A. 241, foot note; 26 Am. & Eng. Ency. Law (2d ed.), pp. 73, 79. And especially where the appellant was in possession of the premises in dispute under an assertion of right. *Mudgett v. Clay, supra;* 12 L. R. A. 243, foot note; 6 Pomeroy, Equity Jurisprudence, § 812; Pomeroy, Specific Performance of Contracts, § 404; Fry, Specific Performance of Contracts, § 738; *Frink v. Thomas*, 20 Ore. 265, 25 Pac. 717, 12 L. R. A. 239; *Mullens v. Big Creek Gap Coal & Iron Co.* (Tenn.), 35 S. W. 439, 441; *Waters v. Travis*, 9 Johns. 450; *Sanford v. Weeks, supra; Cranwell v. Clinton Realty Co.*, 67 N. J. Eq. 540, 58 Atl. 1030; *Hosmer v. Wyoming R. & Iron Co., supra.* The respondents could not declare a forfeiture on the part of appellant without first tendering performance and demanding payment. 6 Pomeroy, Equity, § 815; *Mudgett v. Clay, supra; Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822; *Parkin v. Thorold, supra; Sleeper v. Bragdon*, 45 Wash. 562, 88 Pac. 1036; *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026; *Ellis v. Bryant*, 120 Ga. 890, 48 S. E. 352; *Frink v. Thomas, supra.* Equity will assume that the real intention of the parties was to create a security and not a forfeiture, and will relieve against any forfeiture or penalty inserted for the purpose of enforcing the contract. 6 Pomeroy, Equity, § 816. The obligation to convey and the obligation to pay the purchase price became mutual, concurrent and dependent, and the respondents must execute and

tender a deed before they can maintain an action upon the contract, or to declare a forfeiture thereon. *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184; *Melick v. Cross*, 62 N. J. Eq. 545, 51 Atl. 16; 2 Warvelle, Vendors, p. 824, § 8; *Mix v. Beach*, 46 Ill. 311; *Peck v. Brighton Co.*, 69 Ill. 200; *Mudgett v. Clay, supra; Underwood v. Tew*, 7 Wash. 297, 34 Pac. 1100; *Reddish v. Smith*, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. 781; *Frink v. Thomas, supra.*

H. F. Norris and *T. W. Hammond*, for respondents. The burden was upon appellant to establish the contract with reasonable certainty. *White v. Wansey*, 116 Fed. 345; *Maloy v. Boyett*, 53 Fla. 956, 43 South. 243. The meaning and intent of the parties should be placed beyond the bounds of mere conjecture by full and clear proof. 26 Am. & Eng. Ency. Law (2d ed.), 33. The testimony of one who heard the instrument read some years before and who can give only a small portion of its contents is insufficient. 1 Jones, Evidence, § 228; *Cross v. Aby* (Fla.), 45 South. 820. One who seeks specific performance of a contract must show that he has done his full duty with reference to it. *Case v. Perrigo*, 47 Wash. 675, 92 Pac. 432; *Anderson v. Schneider*, 22 Wash. 363, 60 Pac. 1125; *Jordan v. Coulter*, 30 Wash. 116, 70 Pac. 257; 26 Am. & Eng. Ency. Law (2d ed.), 43-44, 70; Fry, Specific Performance of Contracts, §§ 608, 610; Pomeroy, Specific Performance of Contracts, § 323; 2 Story, Equity, 656. The plaintiff was in default under the terms of the contract, the provisions of which clearly show that time was of the essence of the contract. *Grey v. Tubbs*, 43 Cal. 359; *Sanborn v. Doe*, 92 Cal. 152, 28 Pac. 105, 27 Am. St. 101; *Bennett v. Hyde*, 92 Cal. 131, 28 Pac. 104; *Machold v. Farnan* (Idaho), 94 Pac. 170. The appellant has not at any time displayed that readiness and willingness to perform the contract on its part requisite to entitle it to the relief it seeks. *Fowler v. Sutherland*, 68 Cal. 414, 9 Pac. 674; *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. 910; *Stewart v. Yesler*

Estate, 46 Wash. 256, 89 Pac. 705; *Findley v. Koch*, 126 Iowa 131, 101 N. W. 766; *Boldt v. Early*, 33 Ind. App. 434, 70 N. E. 271; Fry, Specific Performance of Contracts, § 732; 3 Pomeroy, Equity Jurisprudence, §§ 455-6.

RUDKIN, C. J.—During the year 1902 the defendants held block 26, of the subdivision of section 36, township 21, N., R. 2, E., W. M., as the same appears on the official plat of that subdivision on file in the office of the commissioner of public lands, under a lease from the state, by the terms of which they were permitted to purchase the leasehold premises from the state. In the fall of that year the plaintiff was desirous of acquiring the west half of tract B, of this block, being about one-fourth of the entire block, as a site for a reservoir, or tank to be used in connection with its water system. With this object in view, its local manager entered into negotiations with the defendants, and it was agreed that, in consideration of the sum of $150, to be paid by the plaintiff, the defendants would assign their lease and contract to the plaintiff, in so far as it related to the west half of tract B.

It was discovered upon inquiry, however, that the state land commissioner would not consent to such partial assignment, and the parties were compelled to make other arrangements. It was then agreed that the defendants would proceed to acquire title to the entire block from the state, that the plaintiff would pay to the defendants the sum of $150, and one-fourth of all sums the defendants might thereafter be required to pay the state, whether as rental or on the purchase price, and that, upon the defendants acquiring title to the block, they would convey to the plaintiff the west half of tract B. This contract was reduced to writing, but was lost or mislaid and could not be produced at the trial. Pursuant to this contract, the plaintiff paid to the defendants the sum of $150 at the date of its execution, and paid thereafter the sum of $1, being one-fourth of the annual rental for the year 1902 or 1903. The plaintiff immediately entered into

possession of the property and constructed a tank thereon at a cost of from $800 to $900. The tank thus constructed was used continually for about a year and a half, but after that time it was simply kept in place to be used in case of emergency. In the latter part of the year 1904, the defendants exercised their option to purchase the leasehold premises, and entered into a contract with the state to that end, under the terms of which the purchase price was to be paid in ten annual installments.

In the month of September, 1906, the defendants elected to pay up the balance due under their contract, and received a deed or patent from the state on or about the 25th of that month. Under their lease and contract with the state the defendants made the following payments: September 1, 1903, rental $4; October 12, 1904, on contract of purchase, $34.50; October 21, 1904, fee for contract, $1; February 21, 1905, on contract of purchase, $41.57; March 27, 1906, on contract of purchase, $50.97; September 7, 1906, balance on contract of purchase, $248.52; fee for deed $2. The plaintiff failed to pay to the defendants one-fourth of the rental paid the state, or one-fourth of the amounts paid on the contract of purchase from September 1, 1903, until after the final payment was made and a deed received from the state. Sometimes these payments were demanded by the defendants and sometimes they were not.

When the defendants were about to make their final payment to the state, they demanded payment of the plaintiff's portion of all prior payments to enable them to make their final payment, but the plaintiff's local manager informed them that he would first have to communicate with the general office in New York city. A few days after the defendants received their deed from the state they again demanded payment of the balance due from the plaintiff, which was fixed at the sum of $107.47, but the defendants were again informed by the local manager that he would have to communicate with the home office. Further conversations were had after this be-

tween the defendants and the plaintiff's local manager, from time to time, with practically the same result, and the matter dragged along for a period of about two months. The defendants meanwhile resumed possession of the premises and began to improve and clear the same. Finally on December 20, 1906, the plaintiff tendered to the defendants the balance due on the contract and demanded a deed, but the defendants refused to accept the tender, claiming that the contract had already been forfeited for nonpayment. This action was thereupon instituted to enforce specific performance of the contract of sale. The court below dismissed the action at the plaintiff's cost, and from the judgment of dismissal the plaintiff has appealed.

There was no conflict in the testimony as to terms of the lost contract, except in two particulars; first, the respondents contended that the contract contained the usual forfeiture clause, in case the appellant should neglect or refuse to pay its portion of the purchase price when due, while the appellant contended the contrary. Respondents further contended that the appellant agreed to construct a sightly tank on the premises and that this was not done. The appellant admits that such was the oral agreement, but it is extremely doubtful whether this provision was carried into the written contract. For the purposes of this appeal, however, we may concede that the contract contained both of these provisions. Conceding that the contract contained the forfeiture clause, no forfeiture was in fact claimed or declared until after the respondents had obtained their deed from the state, nor until after the whole sum which the appellant had obligated itself to pay had become due and payable, if indeed a forfeiture was claimed at any time before the money was actually tendered. After the respondents acquired their deed from the state, their obligation to convey and the obligation on the part of the purchaser to pay the purchase price became mutual, concurrent and dependent, and neither party could thereafter put the other in default or claim a forfeiture without first tender-

ing performance on his part; and this, whether the contract contained a forfeiture clause or not. *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Underwood v. Tew*, 7 Wash. 297, 34 Pac. 1100; *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184; *Melick v. Cross*, 62 N. J. Eq. 545, 51 Atl. 16; 2 Warvelle, Vendors, p. 824. Under the above authorities, the respondents could only claim a forfeiture and put the appellant in default by tendering a deed and demanding payment of the purchase price, and this they failed to do.

A party may lose his right to invoke the power of a court of equity to enforce specific performance of a contract of sale by mere lapse of time, but a delay of two or three months will not ordinarily suffice for that purpose, except possibly where the value of the property is uncertain and fluctuating, and no such case is presented here. If we concede that the appellant obligated itself to construct a tank of a different kind from that actually constructed, such a covenant related to a collateral matter and the only remedy for its breach would be an action on the covenant. *Crampton v. McLaughlin Realty Co.*, *ante* p. 525, 99 Pac. 586.

For these reasons we are of opinion that the court erred in dismissing the action, and the judgment is reversed with directions to enter a decree in accordance with the prayer of the complaint, upon payment into court of the total amount due under the contract with interest, taxes, etc. If a sufficient tender was made under date of December 20, 1906, which seems to be conceded, no interest will be allowed on the purchase price subsequent to that date.

Reversed and remanded.

FULLERTON, CHADWICK, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7831. Decided February 9, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM C. BINGHAM, *Appellant*.[1]

FALSE PRETENSES—EVIDENCE—SUFFICIENCY—IDENTITY—MISREPRESENTING NAME—MATERIALITY. The evidence is insufficient to sustain a conviction for obtaining money under false pretenses, by means of falsely representing that the accused was the owner and indorser of a check indorsed by J. H. H. when in truth that was not his name and neither the indorsement nor the check were his, where it appears that he had assumed the name of J. H. H. and the check was his property and he had a right to indorse the same in such name, the only false statement being the misrepresentation as to his name; since that was immaterial, and any representations implied from presentation that the check was signed by the drawer, and was the property of accused and indorsed by him, were all true.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered May 18, 1908, upon a trial and conviction of obtaining money under false pretenses. Reversed.

Cain & Hurspool, for appellant.

Otto B. Rupp and *John H. McDonald*, for respondent.

RUDKIN, C. J.—An information was filed in the court below charging the defendant with the crime of obtaining money under false pretenses, committed as follows:

"That the said William C. Bingham, on the 6th day of January, 1908, in the county of Walla Walla, then and there being, did wilfully, unlawfully, feloniously, fraudulently, designedly and with the intent to defraud one John G. Muntinga, and divers other persons to your informant unknown, fraudulently, falsely, and designedly represent to said John G. Muntinga and to A. F. Muntinga, agent of said John G. Muntinga, that he, the said William C. Bingham, was named J. H. Haskell and that a certain check dated January 6th, 1908, drawn on the First National Bank of Walla Walla, in favor of J. H. Haskell and signed by 'L. Youdovitch & Co.,'

[1]Reported in 99 Pac. 735.

for the sum of twelve dollars, was a valid check and that he, the said defendant was the owner of the same and had the right to indorse and transfer the said check and that the indorsement thereon of 'J. H. Haskell' was the indorsement of said defendant; and the said defendant did then and there, by means of said false, fraudulent and pretended statements and representations, obtain from the said John G. Muntinga the sum of eleven dollars lawful money of the United States, property of the said John G. Muntinga, when in truth and in fact as the said defendant then and there well knew, his, the said defendant's name was not J. H. Haskell and said check was not the property of said defendant and said defendant did not have the right to indorse the same; and the indorsement 'J. H. Haskell' was not the indorsement of the said defendant."

The defendant was convicted before a jury, and from the judgment and sentence of the court, this appeal is prosecuted. The sufficiency of the testimony to sustain the conviction is the only question presented by the appeal. It appears that, on the 6th day of January, 1908, the appellant sold a stove which he had theretofore purchased under contract, and not paid for, to L. Youdovitch & Co., junk dealers of Walla Walla, for the sum of $12. The purchase price of the stove was paid by check on the First National Bank of that city. At the time of selling the stove, the appellant represented that his name was J. H. Haskell and the check was made payable to him under that name. Later in the day, the appellant presented the check to the prosecuting witness in payment of a bill for groceries amounting to ninety cents, receiving $11.10 in exchange. This is the money alleged to have been obtained under false pretenses.

The only representation made by the appellant at the time of presenting the check and obtaining the money, aside from representations that might be implied from the overt act of presenting the check in payment for the goods, was the false statement that his name was J. H. Haskell. Assuming that implied representations are sufficient to sustain a conviction

under our statute, the only representations that could be implied from the mere presentation of the check were, first, that the check was signed by the drawer; second, that it was the property of the appellant; and third, that the appellant had authority to indorse and negotiate it. All these representations were in fact true, so that the only thing left to sustain the conviction is the false statement as to the name of the appellant. There is nothing in the record to indicate that the name of the appellant was at all material, except in so far as it identified him as the owner of the check and the proper party to indorse it. He was in fact the owner of the check and had authority to indorse it in the name of Haskell; so that, for aught that appears in the record, the false statement as to the appellant's name was a naked lie, was not relied upon by the complaining witness, and could not have been the operating or moving cause that induced him to part with his money. *Commonwealth v. Drew*, 19 Pick. 179.

Whatever other offenses the appellant may have committed, he was not, in our opinion, guilty of the offense charged in the information, and the judgment must be reversed with direction to dismiss the action. It is so ordered.

FULLERTON, CHADWICK, MOUNT, and CROW, JJ., concur.

[No. 7864. Decided February 10, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Baker River and Shuiksan Railroad Company, Plaintiff*, v. SAM H. NICHOLS, *Secretary of State, Respondent.*[1]

CORPORATIONS—FOREIGN—RIGHT TO DO BUSINESS—COMITY. No principal of comity is involved in the right of a foreign corporation to file articles of incorporation in this state pursuant to the laws of this state; since comity is a rule of expediency based upon the law or decisions of other states, rather than our own.

SAME—FILING ARTICLES—DUPLICATION OF NAMES — STATUTES — CONSTRUCTION. Laws 1903 entitled an act to prevent the duplication of corporate entitlements, which provides that "no corporation shall take the name of another heretofore organized under the laws of this state nor of any foreign corporation having complied with the laws of this state," applies alike to domestic and foreign corporations, although the first paragraph relates only to domestic corporations; and articles of a foreign corporation cannot be filed if the name is the same as that of any domestic corporation; especially in view of Const., art. 12, § 7, providing that no foreign corporation shall be permitted to do business within the state on more favorable conditions than are prescribed for similar domestic corporations (RUDKIN, J., dissenting).

SAME—MANDAMUS. Mandamus will not issue to compel the secretary of state to file improper articles of incorporation, duplicating corporate names, and leave the aggrieved party to its remedy in equity; since the courts will not require the doing of a vain or illegal act, and the public is concerned in maintaining a distinction between corporate names.

Application filed in the supreme court January 18, 1909, for a writ of mandamus to the secretary of state to compel the filing of articles of incorporation. Denied.

Ira Bronson and *D. B. Trefethen*, for relator.

The Attorney General and *W. V. Tanner, Assistant*, for respondent.

[1]Reported in 99 Pac. 876.

CHADWICK, J.—The petitioner, Baker River and Shuiksan Railroad Company, existing under and by virtue of the laws of the state of Oregon, offered to the respondent, as secretary of state of the state of Washington, certified copies of its articles of incorporation, tendered the filing fees, and demanded that it be properly registered and that the usual certificate, authorized to be issued to foreign corporations seeking to do business in the state of Washington, be issued to it. Respondent refused the offer and demand of the petitioner, for the reason that there was at the time a domestic corporation bearing the same name registered in his office which was, in so far as his records indicated, an active and way-going concern. His justification is based upon the following:

"Private corporations may be formed in the manner prescribed by the laws of this state governing corporations for any purpose for which individuals may lawfully associate. No corporation shall take the name of a corporation heretofore organized under the laws of this state, nor of any foreign corporation having complied with the laws of this state, nor one so nearly resembling the name of such other corporation as to be misleading. The secretary of state shall refuse to file said articles of incorporation of any association or corporation violating the provisions of this act." Laws 1903, p. 124.

On the other hand, petitioner relies upon Bal. Code, §§ 4291-93 (P. C. §§ 7214-16), having complied with all the provisions thereof. It is conceded that petitioner, if a domestic corporation, would have no right to file its articles, but it is insisted that the act of 1903 is not broad enough to include a foreign corporation within its terms; that the general laws with reference to foreign corporations doing business in this state are mandatory upon the secretary, and that his duty to receive and file such papers as are properly certified and authenticated should be compelled by the courts, leaving the domestic corporation, if injured, to its remedy in equity.

The only question before the court is whether the secretary was warranted in applying the law of 1903 to the case at bar. Petitioner argues that its right to come into the state cannot be barred or abridged by the statute, because state comity must enter as an element in the construction of the law. It further contends that comity is to be gathered from the statutes of this state, and cannot in any event be determined by the arbitrary judgment of a ministerial officer.

Comity depends not alone upon a disposition to favor the citizen of another state or country, but rests upon well settled principles of practice, expediency, and convenience. It is a rule recognized by courts and applied within bounds of discretion. It is based upon the statute law or decisions of courts of general jurisdiction of other states or countries, rather than upon our own. These will be recognized and given force if it be found that they do not conflict with the local law, inflict an injustice on our own citizens, or violate the public policy of the state. We do not believe that any question of comity is here involved. In the absence of any statute, a foreign corporation would, under the doctrine of comity, be privileged to do business in this state; but, like almost all other states, we have undertaken to prescribe the terms and conditions upon which the foreign corporation may do business. Speaking through the constitution, the people have reserved a further protection to the domestic corporation by saying that:

"No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the law of this state." Const., art. 12, § 7.

Section 1 of the law of 1903 must be construed with reference to its spirit and purpose, and always in the light of the constitution. When so considered, we are of the opinion that it is broad enough to cover foreign as well as domestic corporations. The title of the act is general: "An act to pre-

vent the duplication of corporate entitlements," and while the first paragraph admittedly refers to domestic corporations and may as well have been omitted from the act, the second—"No corporation shall take the name of a corporation heretofore organized under the laws of this state, *nor of any foreign corporation* having complied with the laws of this state"—clearly manifests an intention on the part of the legislature to put all corporations, domestic and foreign, on terms of equality, and prevent any appropriation of an existing corporate name. Protection to both classes being guaranteed by the act, it seems to us that it would be unreasonable to hold that, while the foreign corporation now doing business in the state could claim protection under the law, other foreign corporations seeking to file articles could ignore it until safely registered, and then insist upon its benefits. The act by express terms shields the foreign corporation when domiciled in this state. If, being so domiciled, it can claim the benefit, it must, in declaring its intention to do business in this state, meet the burden of the law.

But if we concede the position of relator, that the act of 1903 applies only to domestic corporations, it is in no better position. If a domestic corporation would not have the right to duplicate the name of an existing corporation and that privilege be allowed the foreign corporation, it would do violence to the prohibitive section of the constitution. This court has, in construing that provision, laid down the broad doctrine that a foreign corporation cannot do that which it is unlawful for the domestic corporation to do. *State ex rel. Amalgamated Republic Mines Co. v. Nichols*, 47 Wash. 117, 91 Pac. 632. While the exact question involved here was not discussed in that case, in its last analysis the decision there rendered is a judicial declaration of the avowed public policy of the state, that every restriction put upon a domestic corporation shall apply to a foreign corporation doing or seeking to do business in the state of Washington. When so

considered, it is of controlling force as an authority in the case at bar.

Relator also contends that it is the duty of the respondent to file the articles, leaving the other corporation to its remedy in equity. This question has been settled in this state. Being satisfied with the rule, we have no disposition to depart from it. *State ex rel. Gorman v. Nichols*, 40 Wash. 437, 82 Pac. 711; *State ex rel. Osborne Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462. Relator's argument may be further met with the suggestion that the public is concerned in maintaining a distinction between corporate names, and by legislative enactment has the undoubted right to protect its interests without resort to a court of equity. The suggestion that our construction would make it possible for designing persons to appropriate the name of a foreign corporation and thus deprive it of the privilege of coming into the state under its corporate name, might properly be addressed to the legislature. So far as the courts are concerned, they cannot assume to protect those who have no legal status under the laws of this state and, so far as we know, may never have. A corporate name has no extraterritorial worth except under the doctrine of comity, and as we have shown, comity is not here involved.

The writ will be denied.

FULLERTON, DUNBAR, CROW, and MOUNT, JJ., concur.

RUDKIN, C. J. (dissenting).—Believing that the act of 1903 quoted in the majority opinion is limited by its terms to domestic corporations, I dissent.

GOSE, J., took no part.

[No. 7392. Decided February 15, 1909.]

AGNES NETHERY, *Respondent*, v. ALFRED NELSON *et al.*, *Appellants*.[1]

WITNESSES—IMPEACHMENT—LAYING FOUNDATION. It is not prejudicial error to permit impeachment of a witness without laying formal or regular foundation, where the conversation in question had been sufficiently called to the attention of the witness while on the stand, and he recalled the circumstances but denied the conversation.

APPEAL—EXCEPTIONS—SUFFICIENCY. In an action for trespass an exception to instructions "to the effect that defendants must ascertain the line or they would be guilty of a wilful trespass," does not raise any objection to an instruction that the burden of proof was upon the defendants to show a casual or involuntary trespass.

TRESPASS—DAMAGES—EXCESSIVE VERDICT. A verdict for $974.19 for trespass in cutting trees is excessive where the testimony most favorable to the plaintiff showed the cutting of forty-seven trees of the stumpage value of $785.74, and the testimony that standing timber left was rendered less valuable was outside the issues, and there was no testimony as to the extent of depreciation of the value of standing timber or of the land.

TRESPASS—VOLUNTARY—EVIDENCE—SUFFICIENCY. A finding that a trespass was not casual or involuntary is supported where defendants cut trees without having made an effort to locate section lines, which were easily located after the trespass.

SAME—DAMAGES. Evidence that 250,000 to 390,000 feet of timber cut was of the value of from $1 to $2 per thousand should not warrant a finding that the fair value of the timber was over $500.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 28, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for trespass. Reversed.

C. W. Hodgdon and *W. H. Abel*, for appellants.

J. A. Hutcheson, for respondent.

[1]Reported in 99 Pac. 879.

RUDKIN, C. J.—This action was instituted to recover treble damages for cutting and removing timber from a tract of timber land in Chehalis county. The jury returned a verdict in favor of the plaintiff in the sum of $974.19, and found specially that the trespass was not casual or involuntary, and that the defendants did not have probable cause to believe that the land upon which the trespass was committed was their own. The court entered a judgment on this verdict for treble damages, and from the judgment so entered, the present appeal is prosecuted. Error is assigned in the admission of testimony, in the giving of instructions, and in the overruling of a motion for a new trial.

(1) The respondent called a witness in rebuttal, and asked him to detail a certain conversation had between him and the appellants' foreman some time before the trespass was committed. After a considerable portion of this conversation had been received in evidence, the appellants objected to the testimony on the ground that no proper foundation had been laid for impeachment, and that the testimony was improper in rebuttal. While the method of impeachment resorted to was somewhat informal and irregular, we think the conversation in question was sufficiently called to the attention of the foreman when on the stand as a witness for the appellants, and at that time he recalled the circumstances but denied that the conversation took place. There was no prejudicial error in this ruling.

(2) The court instructed the jury that the burden was on the appellants to show, by a preponderance of the evidence, that the trespass was casual or involuntary, or that the appellants had probable cause to believe that the land on which the trespass was committed was their own, and the giving of this instruction is assigned as error. The only exception taken to the charge of the court is in the following language: "Defendants except to the instructions of the court to the effect that the defendants must ascertain the line

or they would be guilty of a wilful trespass." This exception manifestly does not refer to the instruction relating to the burden of proof, and the assignment cannot therefore be considered.

(3) It is lastly contended that the verdict is not supported by the testimony. In so far as the damages assessed by the jury are concerned, this exception must be sustained. The testimony most favorable to the respondent tends to show that forty-seven trees in all were cut and carried away, and that they contained 392,871 feet of lumber, of the stumpage value of two dollars per thousand, making a total valuation of $785.74 as against $974.19 found by the jury. Some testimony was offered tending to show that the remainder of the timber on the tract was of less value because of the taking of a part, but this testimony was outside the issues in the case, and there was not the slightest testimony tending to show to what extent the value of the timber not taken or the value of the land itself was depreciated by the trespass complained of.

The special finding that the trespass was not casual or involuntary, and that the appellants did not have probable cause to believe that the land upon which the trespass was committed was their own, is fully sustained by the testimony. The appellants made no effort whatever to locate the section line before cutting the timber, and found no difficulty whatever in marking the location after the trespass was committed. The claim that they mistook a blazed zigzag trail through the forest for a section line evidently did not impress the jury and does not impress this court.

For error in the assessment of the amount of the recovery, the judgment must be reversed or materially modified. Inasmuch as treble damages are allowed in this class of actions, we are not disposed to give the respondent the benefit of the highest valuation based on the highest estimate made as to the quantity of timber taken. The different witnesses for the appellants and the respondent estimated the quantity of timber

at from 250,000 to 390,000 feet, in round numbers, and the stumpage value at from one to two dollars per thousand. Based on these estimates, we think the fair value of the timber taken was $500, and if the respondent is not willing to accept that amount, she must submit to a new trial.

The judgment is reversed, and if the respondent remits from the judgment all sums in excess of $1,500, and costs of suit, within thirty days from the filing of the remittitur in the court below, judgment will be entered for the residue, but if no such remission is made, a new trial will be ordered. Appellants will recover their costs in this court.

FULLERTON, MOUNT, CHADWICK, CROW, and DUNBAR, JJ., concur.

GOSE, J., took no part.

[No. 7795. Decided February 15, 1909.]

GEORGE BUYKEN *et al.*, *Respondents*, v. THE LEWIS CONSTRUCTION COMPANY, *Appellant*.[1]

TRIAL—INSTRUCTIONS—RELEVANCY—TRESPASS—ISSUES AND PROOF. In an action for trespass alleged to have been committed without the knowledge or consent and against the will of the plaintiffs, in which the defendant justified the acts as done pursuant to a written contract with plaintiffs, it is prejudicial error, requiring a new trial, to give an instruction to the jury to the effect that, if the contract was established, the plaintiffs could not recover unless the jury find that acts negligently and carelessly performed caused the damage, there being no evidence or issue as to any negligence of the defendant, and a direct conflict in the testimony making the right of recovery doubtful.

Appeal from a judgment of the superior court for King county, Honorable John S. Jurey, judge *pro tempore*, entered July 23, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for trespass. Reversed.

[1]Reported in 99 Pac. 1007.

Leander T. Turner (*Sanford C. Rose*, of counsel), for appellant.

Bo Sweeney, for respondents.

RUDKIN, C. J.—This was an action in trespass to recover damages for sluicing down and removing earth from a certain lot in the city of Seattle owned by the plaintiffs. The defendant admitted the commission of the acts complained of, though not in manner and form as alleged, and pleaded by way of justification that the sluicing was done pursuant to a verbal contract between the plaintiffs and the defendant, which was afterward reduced to writing and signed by the defendant, though not by the plaintiffs. The reply denied the plea of justification as set forth in the answer. The cause was submitted to a jury under instructions from the court, and a verdict in favor of the plaintiffs in the sum of $1,500 was returned. From a judgment on this verdict, the defendant has appealed.

The principal assignment of error arises out of the following charge of the court, which was duly excepted to:

"If you find from the evidence that there was no such contract as alleged by the defendant in its affirmative defense, which is exhibit No. 2 in the case, but do find from the evidence that the acts performed by the defendant upon the said premises of the plaintiffs were performed with the knowledge and consent of the plaintiffs, then I instruct you that the plaintiffs cannot recover for such acts even though in your opinion the plaintiffs have been damaged thereby, *unless you find from the evidence that defendant negligently or carelessly performed the acts and by reason of such negligence and careless performance the plaintiffs had been damaged.*"

The latter part of this instruction is clearly without the issues presented by the pleadings. The action was prosecuted by the respondents solely on the theory that the acts complained of were committed without their knowledge or consent and against their will, and all their testimony was directed toward establishing the allegations of the complaint

and proving the amount of the resultant damages. The testimony on the part of the appellant, on the other hand, was in support of its affirmative defense, and in reduction of the claim for damages. The question of negligence in the prosecution of the work was not an issue in the case under the pleadings, nor was it made an issue at any stage of the trial. There was no claim that any particular act committed by the appellant was negligently or carelessly committed, nor was there any attempt to segregate damages resulting from negligence from damages resulting from other and independent causes. The instruction was therefore erroneous, and calls for a reversal of the judgment unless we are able to say that the error was not prejudicial, and this we cannot do. There was a direct conflict in the testimony, and the right of recovery was questionable at least. The jury may have found that the acts committed by the appellant were so committed with the knowledge and consent of the respondents, but that damages resulted from the performance of the work in a manner the jury deemed negligent. Under such circumstances, it is incumbent on this court to order a new trial. *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873; *Comegys v. American Lumber Co.*, 8 Wash. 661, 36 Pac. 1087; *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705, 69 Pac. 378. In *Comegys v. American Lumber Co.*, *supra*, the court said:

"This instruction, although a correct statement of the law in a proper case, was not pertinent to the issues to be determined by the jury. The plaintiff in his complaint had stated the facts constituting his cause of action in accordance with the requirements of the code, and the cause of action stated was based upon an express contract, and could not be proved by showing that the defendant was guilty of a tort. The question as to whether the defendant had converted the property of the plaintiff to its own use, and was, therefore, liable for its value, was not in issue, and should not have been submitted to the jury. It is not in accordance with either the letter or spirit of the code to permit a plaintiff to allege one state of facts in his complaint and to recover by proof of an entirely different state of facts at the trial."

The appellant further contends that the court erred in ruling on the competency of one of the witnesses, and in refusing to grant a new trial for insufficiency of the evidence to justify the verdict. The former of these assignments is without merit and the latter is obviated by the reversal of the judgment on other grounds.

For error in the instructions of the court, the judgment is reversed and a new trial ordered.

CHADWICK, FULLERTON, MOUNT, and CROW, JJ., concur.

[No. 7834. Decided February 15, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN C. STOREY, *Appellant*.[1]

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS—STATUTE—TIME OF TAKING EFFECT—DETERMINATION OF FACT—ANIMALS—ALLOWING TO RUN AT LARGE. Laws 1907, p. 566, making it a misdemeanor to permit live stock to run at large in counties where three-fourths of the land is under fence, does not unlawfully delegate legislative powers in providing that ten freeholders and the board of county commissioners shall determine the fact as to three-fourths of the land being under fence, and that notice thereof be given; as a statute may provide for its taking effect upon the happening of a future event.

SAME—CONFERRING JUDICIAL POWERS. Such a law is not unconstitutional as conferring judicial powers on the county commissioners and assessors, their acts being ministerial rather than judicial, and especially as the conferring of judicial powers on them is not obnoxious to the constitution.

SAME—CLASS LEGISLATION—POLICE REGULATIONS. Such an act is not discriminatory, as it applies to the whole state, and being a police regulation, may be made to apply to certain locations.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered August 24, 1908, upon a trial and conviction of permitting live stock to run at large. Affirmed.

[1]Reported in 99 Pac. 878.

Cain & Hurspool, for appellant.

Otto B. Rupp, for respondent.

MOUNT, J.—The appellant was convicted of the offense of permitting live stock to run at large in Walla Walla county. He was prosecuted under the provisions of chapter 230 of the Laws of 1907, p. 566. His contention here is that the act is unconstitutional, upon three grounds: Because (1) it delegates legislative powers to private persons; (2) it confers judicial powers upon purely executive officers, and (3) it discriminates between persons and things of the same class.

Section 1 of the act provides that it shall be unlawful for live stock to run at large in any county of the state in which three-fourths of the lands outside of incorporated cities and towns are under fence. Section 2 provides that it shall be the duty of the board of county commissioners of the respective counties of the state, when ten or more freeholders shall make application for the enforcement of the act, to at once determine whether three-fourths of the lands outside of incorporated cities and towns in such county are under fence. Sections 3, 4, and 5 provide the manner of determining the fact whether the required amount of land in the county is under fence, and recording the same, and for a notice thereof to the public. Section 6 makes a violation of the act a misdemeanor, punishable by fine.

It is claimed by appellant that the act can become effective only upon the petition of ten freeholders, and that the taking effect of the act depends entirely upon the discretion of these freeholders, and that this amounts to a delegation of legislative power to these ten men in their private capacity. If we concede, for this case, that the county commissioners have no power to determine the facts or make the act effective without this petition, we still think it does not follow that there is any delegation of legislative power. The act was passed by the legislature. That authority may say definitely when an act shall take effect; or it may fix an indefinite time

in the future upon the happening of some event before the act shall take effect. Cooley, Const. Lim. (7th ed.), p. 169. The mere fact that the act does not take effect until the contingency arises, does not indicate a delegation of legislative power, even where the contingency depends upon the action of certain persons. It is conceded, if we understand the appellant's position, that certain laws may become effective or not upon local judgment, and Cooley on Constitutional Limitations (7th ed.), pp. 173-4, is cited to that effect. In such cases it cannot be said that legislative authority is delegated. The local judgment merely accepts or rejects the operation of the legislative act. The rule is tersely stated in 8 Cyc. p. 830, as follows:

"While the legislative body cannot delegate the power to legislate, the legislature may delegate the power to determine some facts or state of facts upon which the statute makes or intends to make its own action depend."

And this rule is sustained by the great weight of authority. In this case the apparent intention of the legislature was that the act should be effective in those counties where three-fourths of the land therein was under fence. The designation of the ten freeholders and the board of county commissioners was for the purpose of determining and proclaiming that fact. These persons constitute an agency for a specified purpose, and are in no manner clothed with legislative powers.

It is next claimed that the act confers judicial powers on the county assessor and boards of county commissioners, and that their judgment is made conclusive. There is no direct provision that the judgment of these persons shall be conclusive. These officers are merely the means selected to determine certain facts. Their duties are ministerial rather than judicial. But even if judicial powers are conferred, it is not clear that this would render the act obnoxious to any provision of the constitution.

We see no reason for holding that the act is discriminatory. It is a general act and applies to the whole state. It is in the

nature of a police regulation, in respect to which it is proper that local judgment shall control or that it shall apply to certain locations as the legislature may direct.

The act appears to be a valid exercise of legislative power. The judgment must therefore be affirmed.

Rudkin, C. J., Chadwick, Fullerton, Crow, and Dunbar, JJ., concur.

Gose, J., took no part.

[No. 7383. Decided February 17, 1909.]

Rothchild Bros., *Appellant*, v. M. H. Mahoney, *Respondent*.[1]

Corporations—Actions—Capacity to Sue—Conditions Precedent—Payment of License Fee—Waiver of Objections. Laws 1907, p. 271, § 7, providing that no corporation shall be permitted to commence or maintain an action without alleging and proving that it had paid its annual license fee last due, relates only to the plaintiff's capacity to sue, and under Bal. Code, §§ 4907, 4909, if objection is not taken by demurrer or answer, the same is waived and the action cannot be dismissed for failure to prove payment of the fee (Fullerton, Chadwick, and Dunbar, JJ., dissenting).

Appeal from a judgment of the superior court for Okanogan county, Steiner, J., entered March 7, 1908, in favor of the defendant, upon dismissing an action on contract, for failure of proof. Reversed.

Belden & Losey and *E. Fitzgerald*, for appellant.

Ernest Peck, for respondent.

Crow, J.—This action, instituted by Rothchild Bros., a foreign corporation doing business in this state, for the recovery of the value of merchandise sold, was commenced prior to the taking effect of chapter 140, Session Laws of 1907. The complaint did not allege that the plaintiff had paid its

[1]Reported in 99 Pac. 1031.

annual license fee last due. The amended complaint and reply were served and filed after the act took effect, but neither of them made any allegation in reference to the payment or nonpayment of the license fee. Thereafter the case came on for trial, both parties submitting evidence, at the conclusion of which the defendant made the following oral motion:

"That said action be dismissed on the ground and for the reason that the plaintiff is a foreign corporation doing business in this state and has wholly failed to allege or prove that it has paid its license fee last due as required by chapter 140 of the Session Laws of the state of Washington for the year 1907."

The court, having heard the arguments of counsel, made and entered an order sustaining the motion and dismissing the action. The plaintiff has appealed.

The appellant contends that § 7, of chapter 140, Laws 1907, p. 271, cannot be construed as applying to this action, while the respondent makes the contrary contention. It is admitted that the action was commenced prior to the taking effect of said act, and that the pleadings were not fully at issue when it did take effect, no answer or reply having been served until after August 1, 1907. The contract sued upon was made prior to the passage of the act, and the appellant at that time had a perfect right to maintain its action in the superior court without alleging or proving payment of its annual license fee last due. Section 7 of the act reads as follows:

"No corporation shall be permitted to commence or maintain any suit, action or proceeding in any court of this state, without alleging and proving that it has paid its annual license fee last due. . . . "

It is unnecessary for us to determine whether the section applies to actions pending at the date of its enactment, our view being that it only affects the plaintiff's capacity to sue. Bal. Code, § 4907 (P. C. § 347), provides that the defendant

may demur to the complaint when it shall appear upon its face that the plaintiff has no legal capacity to sue. Section 4909 provides that, when the matters enumerated in § 4907 do not appear upon the face of the complaint, the objection may be taken by answer; and § 4911 provides that, if no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action. As failure to pay the license fee last due would, under the statute, only affect appellant's capacity to sue, the respondent, by failing to object either by demurrer or answer to such want of capacity, waived his right to do so. Under the issues thus raised by the pleadings, he could not thereafter insist that proof of payment of the license fee by appellant should be made.

The trial court erred in dismissing the action. The judgment is reversed, and the cause remanded for a new trial.

RUDKIN, C. J., MOUNT, and GOSE, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to concur in the foregoing opinion. It is said by the majority that it is unnecessary to determine whether the act of March 12, 1907, applies to actions begun before that act went into effect, but to my mind this is the question, and the only question, the record presents. To an understanding of the point involved it is necessary to make a short statement of the facts.

The legislature of 1907 enacted a law relating to fees to be paid by corporations doing business in this state. By the sixth section of the act it was provided that every corporation incorporated under the laws of the state, and every foreign corporation having its articles of incorporation on file herein, should pay an annual license fee in a fixed sum to the secretary of state, on or before the first day of July in each year. By the seventh section it was provided that no corporation should be permitted to commence or

maintain any suit, action or proceeding in any court of this state without alleging and proving that it had paid its annual license fee last due. The appellant is a corporation incorporated under the laws of Oregon, having its articles of incorporation on file in this state. Subsequent to the enactment of the statute above mentioned, but prior to the time it went into effect, it began this action in the superior court of Okanogan county, to recover of the defendant for merchandise alleged to have been sold and delivered to him. The defendant filed an answer after the act went into effect in which he put the allegations of the complaint in issue, but did not suggest the want of an allegation to the effect that the annual license fee of the corporation last due had not been paid. The case thereafter went to trial, and at the conclusion of the same the defendant moved that the action be dismissed for the reason that plaintiff had failed to allege or prove that it had paid its license fee last due. This motion the court granted, after hearing argument thereon and taking the same under advisement, "the plaintiff making no application to reopen the case for the purpose of giving it an opportunity to offer the requisite proof."

The prohibition in the statute, it will be observed, is as much against the maintenance of an action without proving the payment of the license fee last due, as it is against the commencement of an action without alleging the fact. When the defendant moved to dismiss for want of such proof, therefore, it necessarily raised the question whether or not the statute applied to this action, and in my judgment, the lower court was justified in determining it. Whether the question was correctly decided I need not discuss, since the majority hold it is not before us, but I may add that I am unable to discover any reason why it was not correctly decided. The statute is a revenue measure. The section requiring proof to be made in the courts as a prerequisite to the maintenance of an action was intended as a means of enforcing the collection of that revenue. The fee is one the legislature had the power

to impose, and the courts ought to be diligent rather, in enforcing its payment, than in finding means for its evasion.

I am aware that the majority say that the question whether the fee had or had not been paid was not before the trial court for the reason that the defendant's motion was not timely; that he ought to have raised the question when he answered. But this to my mind is not a sufficient reason. The collection of the public revenue ought not to be made to depend on the whim of a defendant. The public interest is involved, and the court ought to be permitted to raise the objection on its own motion if the defendant neglects it, and when the question is suggested at any time before judgment, no matter in what form, it should be held timely and sufficient.

The sections of the statute cited in the main opinion relating to the manner of raising objections to the plaintiff's capacity to sue do not, in my opinion, have anything to do with the question here suggested. They were enacted long prior to the enactment of this statute and are superseded by it in so far as there is any conflict between them. Nor do they control the practice under the later statute further than they are applicable to the changed conditions. The later statute, as has been shown, prohibits the maintenance of an action without making certain proofs, and to the practice under such a statute the sections are wholly inapplicable, since they relate to objections to be taken by answer or demurrer, not to objections going to the sufficiency of the evidence. The judgment should be affirmed.

CHADWICK and DUNBAR, JJ., concur with FULLERTON, J.

[No. 7787. Decided February 18, 1909.]

FIRST NATIONAL BANK OF WENATCHEE *et al.*, *Respondents*, v. LEONARD FOWLER *et al.*, *Appellants*.[1]

APPEAL—NOTICE AND BOND—SEVERAL JUDGMENTS—ACTIONS—CONSOLIDATION. But one notice of appeal and appeal bond is necessary where four actions had been consolidated by a general order of court and tried as one cause, although four judgments were entered, the effect of the order being to discontinue the separate cause and create a new action, which would not, until vacated, be overcome by the judgments.

APPEAL—DISMISSAL—DILIGENCE—STATEMENT OF FACTS—BRIEFS—TIME FOR FILING—EXTENSION. An appeal will not be dismissed for failure to diligently prosecute it or promptly settle the statement of facts or file briefs, when the delay was caused by the prosecution of a mandamus proceeding, following which an order extending time was entered.

APPEAL—NOTICE—PARTIES IN DEFAULT. It is not necessary to serve notice of appeal upon a party defendant in default who had not appeared in the action.

Motion to dismiss an appeal from a judgment of the superior court for Chelan county, Steiner, J.. entered April 3, 1908, in favor of plaintiffs, in consolidated actions on contract. Denied.

Bevington & Finch and *Ira Thomas*, for appellants.

Reeves & Reeves, for respondents.

CHADWICK, J.—In the court below four actions, involving the same subject-matter, were consolidated by order of the court, in which it is recited:

"And by agreement of parties above named appearing and representing the parties in each of said causes, as above indicated, the motions heretofore filed by Leonard Fowler and Mary B. Fowler, his wife, to consolidate all of said civil causes referred to as suits numbered 1, 2, 3, and 4, are hereby

[1]Reported in 99 Pac. 1034.

sustained and said causes of action are consolidated in civil cause No.——, said suit No. 3 in which a receiver has been appointed for the Republic Press, and the separate division of the motions filed by said Leonard Fowler and Mary B. Fowler, his wife, to interplead, the defendants named in said cross-complaints, filed in each of said actions are also hereby sustained, and said parties are by this order made defendants in each of said cross actions and in this consolidated action civil cause No. ——, suit No. 3. This order being made by agreement of counsel of record for the parties thus interpleaded is therefore not excepted to by any of the parties."

Whereupon it was stipulated by all parties appearing in said several actions in civil cause No. ——, suit No. 3, that the consolidated action should be submitted on a certain day and in the following manner:

"Upon the pleadings now on file in said several causes of action as consolidated in said suit No. 3, it being understood that the complaints filed by the several plaintiffs in each of said suits is to be considered as evidence and the answers and cross complaints and interpleaders filed by Leonard Fowler and Mary B. Fowler, his wife, are also to be considered as evidence, and the actions thus consolidated are to be submitted on the issues thus joined and the evidence thus submitted under this stipulation."

The action was set down for trial and tried as one case. There was but one subject-matter involved. Action had been begun by the First National Bank of Wenatchee, a corporation, and by George R. Fisher, to recover several items of indebtedness due and owing from the Republic Press, a corporation, and praying for the foreclosure of certain securities. Leonard Fowler and Mary Blanche Fowler, his wife, defendants and cross-complainants, set up in said consolidated action the fact that they had personal interests in the assets of the Republic Press; that they were the owners of certain property taken over by the receiver of that corporation; that they were in fact sureties for the Republic Press, and asked that their relation be so declared by the court, and that the

assets of the Republic Press be marshalled and applied to the payment of the amounts found due the plaintiffs before their property was made subject to execution.

Judgment was rendered by the lower court in favor of plaintiffs; whereupon counsel for defendants prepared and submitted to the court findings of fact and conclusions of law in the consolidated action, all of which were refused by the court. The court thereupon prepared, or caused to be prepared, separate findings and decrees in each case, and they were so entered. Defendants then moved for a new trial, treating the several judgments of the court as one. After entitling their motion and setting out the several causes by name and number, they proceeded with their motion under the caption: "All of said causes having been consolidated in civil cause No. ——, suit No. 2." The order overruling the motion for new trial was under the same title, as well as all subsequent proceedings in the superior court and in this court. This case was brought to this court upon the appeal of defendants and cross-complainants. Motion is now made to dismiss the appeal upon the theory that there are four judgments and but one notice of appeal and one appeal bond.

That it was within the power of the court to order a consolidation we do not understand to be questioned, but it is insisted that the consolidation was only for trial; that is, for the purpose of taking testimony, and that the court properly entered four several judgments under separate titles. The order of consolidation being general, we do not think it would be overcome by the four judgments entered by the court until vacated by an order entered with the same formality as the order of consolidation. Appellants had a right to, as they in fact did, treat it as one action. To hold otherwise would defeat the object of consolidation, which is "to prevent a multiplicity of suits and to relieve the defendant from the unnecessary expense of several actions, when the rights of

the parties may be fully tried in one. It amounts practically to a change in the mode of trial, disposing of several cases by one trial." 4 Ency. Plead. & Prac., 675. The effect of the order when made by consent of the parties is that "they in effect agree that the separate actions shall be discontinued, and a new and distinct action shall be created in which shall be included and litigated all of the questions presented by the pleadings in the former actions. The power and jurisdiction of the court with reference to this new action are the same as though it had been brought in the manner in which actions are ordinarily instituted." 4 Ency. Plead. & Prac., 701.

Respondents cite the case of *Montgomery v. American Central Ins. Co.*, 106 Wis. 543, 82 N. W. 532, to the effect that where separate judgments are entered in a consolidated action, they cannot be reviewed on an appeal by giving one notice and one bond. While this case seems to be in point, yet reference to the Revised Statutes of the state of Wisconsin shows that it has no application here. The decision is based upon a special statute applicable to insurance cases. Its title is, "To prevent the multiplicity of suits against insurance companies." It provides that, should the insured bring suit upon any policy or policies of insurance, he can join as parties defendant any and all insurance companies interested in the loss. It is also specially provided that distinct verdicts shall be rendered and separate judgments entered against each insurance company. Its purpose is manifest—to take all of the testimony in one case and apportion the loss, leaving the case to proceed after verdict and judgment, as distinct actions. Other cases cited by respondents are not in point. They merely hold that, under statutes allowing separate appeals from interlocutory as well as final orders, a review of two or more of such orders cannot be had by filing a single notice and bond. None of them elucidates the rule of practice with reference to consolidated actions. In the case of *Bramell v. Adams*, 146 Mo. 70, 47 S. W. 931,

while no order of consolidation had been made and but one judgment had been entered—here we have the order of consolidation and four judgments—we think the true rule in such cases is declared:

"There was but one trial in the lower court. The same evidence was, by consent, received in all the cases. They were, in effect, treated as one suit. They were, for all practical purposes, consolidated, although no formal order was made for that purpose. . . . We will treat the suits, in passing upon this objection, as one case, as the parties have done for all other purposes, and as if an order of consolidation had been made. We cannot see that appellants have been injured in any manner by the form of procedure, and, in the absence of material error, we are powerless, under the statute, to reverse, even though there may have been a departure from technical precision in the matter complained of by appellants."

This case was before this court upon an application for a writ of mandate to compel the certification of a statement of facts (*State ex rel. Fowler v. Steiner*, *ante* p. 239, 98 Pac. 609), and if there was no other reason, we should feel warranted in denying this motion, for the matter was treated by all parties in that proceeding as one case. Being convinced that no more than one notice of appeal is necessary in this case, it follows that the objection to the sufficiency of the bond must fall with our ruling upon the notice.

We are also asked to dismiss the appeal for the reasons that it has not been diligently prosecuted, that the statement of facts was not promptly settled, the briefs were not filed within the proper limit of time, and notice of appeal not served on defendant, the Republic Press. The time for appeal began to run April 20, 1908, when the motion for a new trial was overruled. Notice of appeal was given July 2, 1908. The delay in filing the statement of facts and the briefs was occasioned by delay in prosecuting the mandamus proceeding, following which an order extending the time was entered. It was not necessary to serve a notice of appeal on

the Republic Press, as the record shows it to be in default, no proper appearance having been made in its behalf.

The motion to dismiss the appeal being without merit, it is denied.

RUDKIN, C. J., FULLERTON, CROW, and MOUNT, JJ., concur.

[No. 7621. Decided February 23, 1909.]

PROTECTIVE MINING COMPANY, *Respondent*, v. FOREST CITY MINING COMPANY, *Appellant*.[1]

MINES AND MINERALS—MINING CLAIMS—ACTIONS—QUIETING TITLE — PLEADING — COMPLAINT — ALLEGING DISCOVERY OR RELOCATION. A complaint in an action to quiet title to a mining location alleging ownership, possession and adverse claim by defendants is not demurrable because it fails to allege an actual discovery of mineral or a relocation of abandoned ground, such matters being evidentiary.

SAME—LOCATION—BOUNDARIES—FAILURE TO ERECT MONUMENTS. The locator of a mining claim who fails to erect monuments or define the boundaries, assumes the risk of intervening rights of third parties.

SAME—NOTICE—ABANDONED GROUND—POSSESSION—COLOR OF TITLE. A location notice on abandoned ground, coupled with possession and peaceful entry, is sufficient color of title as against a prior locator, although the notice fails to show that it was a relocation, where the defendants had never made any proper location; since one having no legal rights cannot question the right of one in peaceable possession.

SAME—DISCOVERY—POSSESSORY RIGHTS. A discovery, after location of a mining claim and the posting of notices, is sufficient, in the absence of intervening rights, to complete possessory rights under the location.

SAME—FORFEITURE—ASSESSMENT WORK—EVIDENCE. The evidence sufficiently shows a failure to do assessment work, working a forfeiture of the claim, where the locators merely paid in good faith $500 to parties who did no more than go upon the ground and make a pretense of doing the work.

[1]Reported in 99 Pac. 1033.

Appeal from a judgment of the superior court for Skagit county, Joiner J., entered March 26, 1908, upon findings in favor of the plaintiff, in an action to quiet title. Affirmed.

Million, Houser & Shrauger, for appellant.

E. H. Kohlhase, for respondent.

CHADWICK, J.—In the year 1901 defendant's grantor filed location notices covering three mining claims, in Skagit county. In June, 1907, one Cleveland, acting as agent for the plaintiff, filed location notices upon the same property. Plaintiff brought action against defendant to quiet its right of possession to the mining ground, alleging its location, that it had failed and neglected to perform its assessment work for the years 1906 and 1907, that it had forfeited all its rights in and to the property, that its claim of ownership was hostile and adverse to plaintiff; and praying for judgment that its "right of possession be held to be paramount to that of plaintiff." After a demurrer setting up all the statutory grounds had been overruled, defendant answered. It asserted its right of possession to the ground described in the complaint, that it had been ousted by plaintiff, and that it had done its assessment work in each year except the year 1907, when it was prevented from doing the work by reason of having been ousted; and further that plaintiff had not made any discovery of valuable mineral or in any manner complied with the laws relating to assessment work on mining claims. From a judgment in favor of plaintiff, defendant has appealed.

Counsel suggests that the court erred, (1) in overruling the demurrer; (2) in finding that respondent had made a valid location upon the property; and (3) in finding that appellant had failed to do its assessment work for the years 1906 and 1907.

(1) We think the demurrer was properly overruled. Respondent did not allege that it had made an actual discovery

of mineral upon the ground located, or excuse the absence of such allegation by alleging that its location notices showed that its act was a relocation of abandoned ground. Nor do we think this allegation necessary. It was enough for respondent to allege its ownership and possession and the adverse claim of appellant. The things suggested are evidentiary, and come within the rules of evidence rather than of pleading. The complaint was sufficient.

(2) It may well be questioned whether there is a sufficient showing to warrant the court in holding that respondent's location is a valid one, and it is quite as uncertain whether the court actually held that valid locations were made. There is no testimony that a discovery had in fact been made at the time the ground was located by respondent's grantor. Under the pleadings and evidence, the locations of respondent must be treated as original locations of open ground. They were not made with reference to any attempt on the part of appellant to locate and hold the ground. The court did find, however, that the appellant "claims the right of possession of the aforesaid mining claims by reason of their prior location," and that "plaintiff was in possession of the claims;" and decreed that "plaintiff's right to possession in and to the mining claims in this action described be and the same is hereby quieted as against the claim of possession of the defendant." It was admitted in the pleadings that respondent was in possession, and the testimony shows that appellant had never in fact made a proper location, in that the claims were not bounded and marked with stakes or monuments as by law required. So far as the technical location of the claims is concerned, the parties are equally delinquent. The failure of the one finds a counterpart in the omission of the other. The only question for determination is the present possession of the disputed ground. When appellant took over the ground without defined boundaries, and during the continuance of its claim erected no monuments or corner posts so that the

boundary lines of its claims could be readily traced, it assumed at its peril the risk of intervening rights of third parties. *Brockbank v. Albion Min. Co.*, 29 Utah 367, 81 Pac. 863; 1 Snyder, Mines, §§ 384, 385, 389, 447, 449; 1 Lindley, Mines, § 330; *Erwin v. Perego*, 93 Fed. 608; *Jupiter Min. Co. v. Bodie Consolidated Min. Co.*, 11 Fed. 666.

Although a discovery was not alleged or proved, we think a location notice lacking in the particular complained of was a sufficient color of title, when coupled with possession gained under a peaceful entry, to warrant the findings and conclusions of the court. Appellant, having no legal rights in the disputed ground, cannot question the right of another who is in peaceable possession. 1 Snyder, Mines, § 234. As between the parties and the government, respondent had the title and was "entitled to hold it until some one other than the government could show a better or paramount title. In the absence of intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted and the boundary marked is immaterial, and, where the discovery is the result of work subsequently done by the locator, his possessory rights under his location are complete from the date of such discovery." *Cedar Canon Cons. Min. Co. v. Yarwood*, 27 Wash. 271, 67 Pac. 749, 91 Am. St. 841; *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673; *Jupiter Min. Co. v. Bodie Consolidated Min. Co., supra;* 1 Lindley, Mines, § 335. The extent to which courts will go in the protection of possessory rights in mining claims is fully treated and the authorities collected in 1 Lindley on Mines, §§ 216-219.

(3) It is clearly shown that appellant did not perform its assessment work for the year 1906 in the manner and to the value as required by law. It is true it paid the sum of $500 to parties whom it had no doubt employed in good faith, but who did no more than go upon the ground and make pretense of doing the work. This is not a compliance with the law. The work must be done as required in the Federal statutes or

a forfeiture results. It follows that respondent's possession was lawful.

The decree of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 7548. Decided February 23, 1909.]

DOUGALD McALLISTER, *Respondent*, v. OKANOGAN COUNTY, *Appellant*.[1]

PUBLIC LANDS — SETTLERS — RIGHT OF OCCUPANCY — UNSURVEYED LAND—STATUTES—CONSTRUCTION. Vol. 23 Stat. 321, prohibiting the unlawful occupancy of the public domain was not intended to prevent actual *bona fide* settlers from inclosing an entryman's proportion of unsurveyed land.

SAME—GRANTS—RIGHTS OF WAY—HIGHWAYS — SETTLERS ON UNSURVEYED LAND—POSSESSORY RIGHTS. U. S. Rev. Stats., § 2477, granting rights of way over the unreserved public lands of the United States, and Laws 1903, p. 155, authorizing boards of county commissioners to accept by resolution such Congressional grant, do not amount to a grant *in praesenti*, as to unsurveyed lands in the possession of a *bona fide* settler; but the grant is held in abeyance until a highway is established by law (overruling *Okanogan County v. Cheetham*, 37 Wash. 682).

SAME—EMINENT DOMAIN. A *bona fide* settler in peaceable possession of an entryman's proportion of unsurveyed public lands, who had enclosed the lands and made improvements, has such an interest in the lands as to preclude the opening of a county road across the same without condemning his interests.

Appeal from an order of the superior court for Okanogan county, Kellogg, J., entered June 6, 1908, granting a temporary injunction restraining the opening of a county road, after a hearing before the court. Affirmed.

William C. Brown, for appellant.

P. D. Smith, for respondent.

[1]Reported in 100 Pac. 146.

FULLERTON, J.—In the early part of the year 1901, the respondent, Dougald McAllister, who was then a qualified entryman under the homestead laws of the United States, settled upon certain unsurveyed and unappropriated public lands, in Okanogan county, equal in quantity to about one hundred and sixty acres, with the intent of entering the lands as a homestead when the government surveys should be extended over them. Shortly after making his settlement, the respondent enclosed the lands with a substantial fence, and since then has resided on the lands continuously, cultivating the same and raising crops thereon.

In the spring of 1907, the county commissioners of Okanogan county directed the county engineer to lay out and survey a route for a county road between certain designated points in that county. The county engineer surveyed the road as directed, and in doing so extended his surveys across the land enclosed by the respondent. On the return of the field notes of the survey to the commissioners, that body by resolution, passed pursuant to the statute of March 14, 1903 (Laws 1903, p. 155), declared the lands for thirty feet on each side of the line marked by the survey to be a public highway and county road, to be known as the Riverside and Tunk Creek county road. The resolution further recited that the respondent had erected and was maintaining illegal fences on the public lands of the United States which materially interfered with the establishment of the proposed public way, and ordered that one A. F. Leach, a special agent of the United States, be requested to cause the immediate removal of such illegal fences. Later on the county proceeded to open the road, and expended in construction work approximately $1,200, opening the same from its eastern terminus westerly to a point near respondent's enclosure. On its attempting to proceed through the enclosure, the respondent brought the present action to enjoin it from so doing.

At the hearing it was shown that the road as constructed had destroyed an irrigation ditch which the respondent had

constructed some seven years before; also, that its further construction would pass through a place the respondent had reserved for a reservoir site for irrigating purposes, and render it unfit for such purposes, and would require much additional fencing; but no estimate was made by any of the witnesses as to the amount the respondent would be damaged in dollars and cents by the construction of the road across his enclosure. At the commencement of his action, the respondent obtained a temporary restraining order, coupled with an order to show cause why a temporary injunction should not be issued pending the final determination of the action. On the hearing had in pursuance of the order, the foregoing facts appeared, whereupon the court issued a temporary injunction enjoining the county from opening the road across the respondent's enclosure, and the county has appealed.

The county asserts the right to establish a public road across the enclosure of the respondent by virtue of § 2477 of the revised statutes of the United States, which grants a right of way over the unreserved public lands of the United States for the construction of highways, and the act of the legislature of the state of Washington authorizing the boards of county commissioners of the several counties of the state to accept by resolution the grant therein contained. Laws 1903, p. 155. If we may be permitted to judge from the resolution of its board of county commissioners declaring the route surveyed to be a public highway, the first thought of the county was that the settlement of the respondent, being in advance of the government surveys, was without right and his enclosure unlawful and subject to be removed by the government officers on complaint of any person whose rights were affected thereby. Its learned counsel, however, argues the case in this court upon another theory. He contends that the grant of Congress of a right of way over the public lands for the construction of a highway is a grant *in praesenti*, and imports immediate transfer of interest, so that when a highway is once definitely located the title attaches as from the date of the act, cutting

off all intermediate interests; and in the present case, since the respondent settled upon the land in question after the passage of this act of Congress, his interests are subordinate thereto and subject to the right of the county to establish a highway across the land enclosed by him by resolution as provided for by statute.

But we cannot think either of these positions tenable. A settler upon the public land in advance of the surveys who encloses no greater area than the land laws permit him to enter is not a trespasser, nor is his enclosure unlawful. On the contrary, from the very beginning of the government such settlements have been encouraged. In all of the great grants of the public domain made by Congress, the rights of those on the lands in advance of the grants, whether on the surveyed or unsurveyed lands, have been protected; and even in the reservations of lands made for the benefit of so cherished an object as the common schools, it was provided that, when by the extension of the surveys it should be found that settlement had been made on the reserved sections, other lands should be selected in lieu thereof, and the settler permitted to enter the lands as if the same were unappropriated public lands. The act of February 25, 1885 (23 Stat. at Large, 321), to prevent unlawful occupancy of the public domain, was not intended to prevent actual bona fide settlers from occupying and enclosing an entryman's proportion of the public domain. In the language of the Supreme Court of the United States in *Cameron v. United States*, 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459:

"The act of Congress . . . was passed in view of a practice which had become common in the Western Territories of enclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, without shadow of title to such lands, and surrounding them by barbed wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence. The law was, however, never intended to operate upon persons who had taken possession un-

der a bona fide claim or color of title; nor was it intended that, in a proceeding to abate a fence erected in good faith, the legal validity of the defendant's title to the land should be put in issue. It is a sufficient defence to such a proceeding to show that the lands enclosed were not public lands of the United States, or that defendant had claim or color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States."

To the same effect is *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, wherein the court said:

"A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified time after the surveys, and the return of the township plat, the settler takes certain steps, that is, files a declaratory statement, such as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, he acquires for the first time a right of preemption to the land. . . . He has been permitted by the government to occupy a certain portion of the public lands, and therefore is not a trespasser, on his statement that when the property is open to sale, he intends to take the steps prescribed by law to purchase it; in which case he is to have preference over others in purchasing, that is, the right to preempt it. The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him, if you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and, when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them."

The second contention undoubtedly finds support in the comparatively recent case from this court of *Okanogan County v. Cheetham*, 37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027. In this case, while perhaps not strictly necessary to

a decision of the questions presented, it was said that the grant of the right of way made by this act was a grant *in praesenti*; and cases were cited which held, under grants containing similar expressions, that a present interest passed by such a grant, which took effect as of the date of the grant whenever the land granted was definitely located. But, on further consideration, we have reached the conclusion that this is not a correct construction of the act.

The case chiefly relied upon as supporting the doctrine of a present grant was *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578. But an examination of the grant construed in that case will show that it is not at all similar to the grant in the act now in question. In that case the grant was made to a grantee named in the act, and who was then capable of accepting the grant. The right of way granted was limited to a single line through specifically defined territory, and its acceptance by the grantee named exhausted the grant. It was a conveyance, pure and simple. Not so, with the act here in question. It has no limitation as to the territory in which it operates. No grantee is named in it, and any corporation, whether public or private, capable of establishing highways, has the right under it to construct a highway over any of the unreserved public lands. The act, in all of its essential features, is a law rather than a conveyance. It is a grant in the sense that the Oregon donation act, the preemption act, and the homestead act, are grants, and subject to the rules that govern such acts. That is to say, the grant in each of these several acts becomes complete upon a compliance with the terms of the act, and the grant dates, at the earliest, from the time the initiatory steps are taken which ripen into the completed title. As was said by the supreme court of the United States, when speaking of the Oregon donation act, in *Hall v. Russell*, 101 U. S. 503, 25 L. Ed. 829:

"The opening words of sect. 4 are 'that there shall be, and hereby is, granted.' This is appropriate language in which

to express a present grant, but as was well remarked by Mr. Justice Field for the court in *Missouri, Kansas, and Texas Railway Company v. Kansas Pacific Railway Company* (97 U. S. 491), 'It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress.' There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time. Thus, in *Rutherford v. Green's Heirs* (2 Wheat. 196), the grantee was Major-General Greene; *Lessieur v. Price* (12 How. 59), the State of Missouri; in *United States v. Arredondo* (6 Pet. 691), Arredondo & Son; in *Fremont v. United States* (17 How. 542), Alvarado; in *Schulenburg v. Harriman* (21 Wall. 44), the State of Wisconsin; in *Leavenworth, Lawrence, and Galveston Railroad Company v. United States* (92 U. S. 733), the State of Kansas; and, without particularizing further, it may be said generally that in the swamp-land cases and all the internal-improvement-grant cases, where for the most part the question has arisen of late, if a grant has been held to take effect presently, the State or some corporation, having all the qualifications specified in the act, has been designated as grantee. In other words, when an immediate grant was intended, an immediate grantee, having all the requisite qualifications, was named."

So the grant in question here remains in abeyance until a highway is established under some public law authorizing its establishment, and takes effect as a grant from that time.

Did the respondent have such a right in the lands of which he had possession as to preclude the establishment of a highway through them without condemning his interests? We think he did. As we have shown, he was not a trespasser on the lands. On the contrary, he was there by the express per-

mission of the government. His interests were valuable and constituted property. And while the government of the United States might have made a valid grant of the lands to another without consulting him or acquiring his interests, it has not done so, and as against everybody but the government his interests are paramount. Whether the county can, under the act of 1903 above quoted, establish a highway across unsurveyed public land by marking the way on the ground and declaring the way marked a highway by resolution, we need not here inquire. We are clear that it cannot do so as against the interests of the respondent. As to him, a highway must be established after the manner prescribed in the act of 1895, and the acts amendatory thereof, or by user for such a period as will ripen into a prescriptive right.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

CROW and MOUNT, JJ., concur in the result.

[No. 7828. Decided February 23, 1909.]

JOHN W. WURSTER, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—ACTIONS—CLAIMS—AS CONDITION PRECEDENT—REASONABLENESS OF REQUIREMENTS — STATEMENT OF CLAIMANT'S RESIDENCE. It is an unreasonable requirement that a claimant for damages against a city shall state his residence for one year last past in a claim to be filed with the city, as a condition precedent to action against the city, and hence one that the city has no power to enforce by ordinance (CHADWICK, FULLERTON, and MOUNT, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 29, 1908, upon sustaining a demurrer to the complaint, in an action for personal injuries sustained by a pedestrian in a street. Reversed.

[1]Reported in 100 Pac. 143.

Parker & Brown, for appellant.

Scott Calhoun and *James E. Bradford*, for respondent.

DUNBAR, J.—This was an action against the city of Seattle for the death of a ten-year-old child, caused by coming in contact with a live wire which, it is alleged, was brought to the ground in a certain street in the city of Seattle by reason of the city's negligently permitting an upright pole, on which the wire was fastened, to fall to the ground. A demurrer was interposed to the complaint, for the reasons (1) that there was a defect of parties plaintiff, (2) that the complaint did not state facts sufficient to constitute a cause of action, and (3) that the claim attached to the complaint was invalid and did not comply with any of the terms of the city charter relative to filing of such claims. This demurrer was sustained by the court, and the plaintiff electing to rely upon his complaint, judgment was entered dismissing the action, and from such judgment this appeal is taken.

No argument was made in this court, orally or by brief, in favor of the first two grounds set forth in the demurrer; and an examination of the complaint satisfies us that no successful argument could be made in that regard. We conclude that the demurrer was sustained on the third ground; not for the reason stated so broadly in the demurrer that the notice did not comply with any of the terms of the city charter relative to the filing of such claims, but for the reason that the claim did not state the residence of the claimant for one year last past, this being a requirement of the charter. This is the only ground which was argued by counsel upon this appeal, either in their briefs or orally. Since the court sustained this demurrer, this question has been passed upon by this court, after due consideration and a thorough investigation of the authorities, in *Hase v. Seattle*, *ante* p. 174, 98 Pac. 870, and we there held that this provision of the charter was unreasonable and therefore could not be sustained. This court also held in *Jones v. Seattle*, *ante* p.

245, 98 Pac. 743, that this charter provision could not be literally enforced by holding good a notice where the language of the claim was, "That during the time herein mentioned and long prior thereto she was a resident of Seattle, King County, Washington." Counsel for respondent, in their oral argument presented in this case, earnestly urge the court to overrule the decision in *Hase v. Seattle*; but both their oral argument and the arguments presented in the brief are practically the same as the arguments presented to the court in that case, and after duly considering the arguments presented, we are not convinced that we should overrule the decision in the case above referred to.

The judgment in this case will therefore be reversed, and the case remanded with instructions to proceed with the trial of the cause.

RUDKIN, C. J., CROW, and GOSE, JJ., concur.

CHADWICK, J. (dissenting)—I dissent. The charter of the city of Seattle, art. 4, § 29, provides that claims for damages against the city may be prosecuted provided a claim meeting the following conditions is filed: (1) Presentation within thirty days after the time said claim accrues; (2) accurate location and description of the defect that caused the injury; (3) accurate description of the injury and items of damages; (4) the residence of the claimant for one year preceding the time of injury.

Now, if it be a reasonable requirement that a claim must be presented within thirty days—and this court has so held (*Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025; *Ehrhardt v. Seattle*, 40 Wash. 221, 82 Pac. 296); if it be a reasonable requirement that the location and description of the defect be set out—and this court has so held (*Falldin v. Seattle*, 50 Wash. 561, 97 Pac. 658; *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431); if it be a reasonable requirement that the injury be accurately described, a compliance with which would generally require a resort to technical advice and direction—

and this court has so held (*Mears v. Spokane*, 22 Wash. 323, 60 Pac. 1127); I can conceive of no reason why we should have held, or should now hold, a requirement that a claimant should give his residence for the year preceding the time of his injury, to be unreasonable. I grant that any condition put upon a claimant must be a reasonable one, and that all such provisions should be liberally construed in favor of the claimant, and to that extent I have no quarrel with the case of *Hase v. Seattle*, *ante* p. 174, 98 Pac. 870, upon which the majority opinion rests. But I have seen no argument, either in that case or in any other, that convinces me that it is unreasonable to require a claimant to make such discovery of his antecedents as will fully protect the city in its right to know its adversary and investigate his character. The provision is in aid of the honest litigant, rather than a stumbling block and pitfall. In many cases the character of the claimant would be an essential element in effecting a compromise of claims that might otherwise be doubtful. It puts no burden on the deserving, while it may be a most essential weapon in the defense of the claims of the dishonest. This should be the supreme test of reasonableness, when considered in connection with this charter provision. Clearly it seems to me we have assumed to substitute the judgment of this court for that discretion which the legislature has properly lodged in the city of Seattle, the exercise of which is essential to the orderly government of the municipality. As is said in the *Hase* case, there is a dearth of authority upon the exact question before us, but it seems to me that my opinion is sustained by reason as well as the logic of the cases to which I have referred.

FULLERTON and MOUNT, JJ., concur with CHADWICK, J.

[No. 7528. Decided February 24, 1909.]

CHARLES AKIN, *a Minor, by Rufus L. Akin, his Guardian Ad Litem, Respondent*, v. BRADLEY ENGINEERING & MACHINERY COMPANY, *Appellant*.[1]

NEGLIGENCE — DANGERS ATTRACTIVE TO CHILDREN — CONTRIBUTORY NEGLIGENCE. It is a question for the jury whether a boy eleven years of age was guilty of contributory negligence in attempting to explode dynamite caps by contact with dry batteries.

APPEAL—DECISION—LAW OF CASE. A decision on a former appeal as to the sufficiency of facts stated by counsel in his opening statement is the law of the case, and conclusive on review of evidence showing the same facts.

APPEAL—REVIEW—INSTRUCTIONS. Error cannot be predicated upon the refusal to give instructions in any particular language where the jury were properly instructed.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. An instruction that if the plaintiff was guilty of contributory negligence which directly and proximately contributed to his injury, is not objectionable as failing to define contributory negligence, as it in effect defines it as such negligence on the part of the plaintiff as helped to produce the injury.

SAME—DANGERS ATTRACTIVE TO CHILDREN—KNOWLEDGE OF DANGER. An instruction on the subject of contributory negligence of a boy is not objectionable in that it failed to define the degree of knowledge that he must possess to render him responsible; it being sufficient to state that the jury must take into consideration the amount of prudence, care and judgment which would ordinarily and reasonably be expected of a boy of his age, under the circumstances.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered March 18, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Myron A. Folsom and *B. B. Adams*, for appellant.

Merritt, Oswald & Merritt, for respondent.

[1]Reported in 99 Pac. 1038.

DUNBAR, J.—This action was brought by Charles Akin, a minor, through his guardian *ad litem*, against defendant, to recover for injuries alleged to have been received as a result of the explosion of a dynamite cap. The first trial was held in May, 1907, and resulted in a judgment of nonsuit at the conclusion of plaintiff's opening statement. An appeal was taken to this court, and the judgment was reversed and the cause remanded with instructions to hear the evidence. Upon the second trial the plaintiff, at the conclusion of plaintiff's evidence and again at the conclusion of the whole evidence, moved for judgment, which motion was denied. The court refused the instructions requested by the defendant, the case went to the jury, and a verdict was returned in favor of plaintiff for the sum of $2,500. Judgment was entered thereon, and from such judgment this appeal was taken.

It is assigned that the court erred (1) in refusing to dismiss the jury and enter judgment for the defendant at the close of the whole evidence; (2) in refusing to give instructions numbered 1, 2, 3, 6, and 7, as requested by appellant. For a statement of the case reference is here made to the decision of this court on the former appeal, reported in 48 Washington, at page 97, 92 Pac. 903. It is true that decision was based on the presumption that the statement of the facts made by the attorney for the respondent was true, the court having dismissed the action on the opening statement of respondent's attorney. But it is, we think, apparent from the record that the matters contained in the statement which was the basis of the former decision, while probably failing of proof in some minor details, were substantially proven as stated by respondent's attorney, and that there was sufficient proof to go to the jury on the question of negligence and contributory negligence. It is earnestly contended by counsel for appellant that the boy, Charles Akin, was guilty of contributory negligence, because he must have known that he would probably be hurt if the cap exploded, and that he must have known that the cap was liable to

explode if he touched it to an electric battery. But this court in its former decision did not indorse this view, which was the same view that was urged by the counsel for appellant at that time. The court, in passing upon that question, said:

"It seems to be conceded that respondent would have been liable had the boy been injured by exploding the cartridge against a rock or with a hammer. It would seem that any natural, available method which the boy himself, through his inexperience and lack of knowledge, would adopt for the purpose of creating an explosion, would bring the case into the same category as one where the explosion was made by a rock or hammer. For instance, if the boy had struck a match and exploded the cap with the heat thereof, or had deposited the cartridge upon a hot stove, it would seem, in principle, to be the same as if he had exploded it with a hammer or with a battery. An intervening cause, to be a defense in an action of this kind, must ordinarily come from an outside source, as an act of God or of some human or other agency, independent of the ignorant and inexperienced conduct or omission of the boy in question. The ignorance and inexperience of this boy, if found as stated by his counsel, relieves him from the charge of contributory negligence. If he knew or suspected that this cartridge would explode when brought in contact with the battery, and was old enough and intelligent or experienced sufficiently to understand that such an explosion would probably do him serious injury, then he would not be entitled to recover. These matters were matters to be shown by the evidence and to be thereafter passed upon by the jury or court."

These matters were shown by the evidence, and the weight of the evidence was passed upon by the jury. It will be seen that, if the contention of the appellant is true, that the boy was guilty of contributory negligence because he thought the cap might explode when placed in contact with the battery, the former decision of this court was wrong, because the statement upon which that decision was based was to the effect that the boy proceeded to make an experiment of touching off the cap. But right or wrong, that

decision is the law of this case, and the law under which the case was retried.

It is urged that the court erred in refusing to give the following instructions:

"(6) You are further instructed that, if the plaintiff Charles Akin knew or suspected that this cartridge would explode when brought in contact with an electric battery, and had sufficient intelligence or experience to understand that he might be injured by the explosion, no recovery can be had, and your verdict must be for the defendant.

"(8) The law does not presume that the plaintiff Charles Akin did not have the intelligence or experience to understand the danger of bringing the cartridge in contact with an electric battery, and unless the record shows that he did not have intelligence enough to appreciate the danger, contributory negligence, if shown by the evidence, is a defense and your verdict must be for the defendant."

It is conceded that the instructions of the court fairly stated the law, but it is claimed that they were not definite enough, and were so general in their nature that the jury were unaided by such instructions. It will, of course, be conceded that it is the established law of this jurisdiction that error cannot be based upon the refusal of the court to couch its instructions in any particular language. An examination of the instructions given by the court convinces us that the jury were properly and clearly instructed on the law governing the case.

The court, among other things, instructed the jury as follows:

"So far as this defense which is interposed by the defendant company in which they allege that the boy was guilty of contributory negligence, the burden is upon the defendant company in order to establish that defense to prove by a fair preponderance of the evidence to the satisfaction of the jury that the boy was guilty of contributory negligence. If you should find by a preponderance of the evidence in the case that the defendant company was guilty of negligence in the particulars in issue here, and as the result of that negligence proximately and directly the plaintiff was injured, it would

then be necessary for you to further inquire as to whether or not the defendant company has shown by a fair preponderance of the evidence that the boy was guilty of contributory negligence. If you should find by such preponderance of the testimony of Charles Akin, the plaintiff was guilty of contributory negligence, and that that contributory negligence directly and proximately contributed to this injury, then you should find for the defendant. In determining the question whether or not Charles Akin was guilty of contributory negligence to such an extent as to directly and proximately and materially contribute to the injury which he suffered, it is the duty of the jury to take into consideration the boy's age and all of the circumstances surrounding him, his experience or lack of experience, his knowledge or lack of knowledge, the amount of prudence and care and judgment which would ordinarily and reasonably be expected of a boy of that age under the circumstances and conditions shown by the testimony in this case. That is the rule by which the question of whether or not he is guilty of contributory negligence is to be measured by the jury. You should not apply to the plaintiff in the case the same rules you would apply to a grown man. You should make allowances for his youth and in attempting to determine the question of his contributory negligence or the lack of it, inquire whether or not he exercised such care as would reasonably and ordinarily be expected of a boy of his age and intelligence and experience under like circumstances and conditions."

Counsel objects to this instruction for the reason that it fails to define contributory negligence. The law does not require courts to define ordinary words and phrases. An intelligent juror understands what they mean, and an attempt to define words of an ordinarily accepted meaning tends to mystify rather than enlighten. A plain definition of contributory negligence is such negligence on the part of plaintiff as helped to produce the injury complained of. This, in effect, the court told to the jury in the instruction above set forth—stated, it is true, in another form—when it was said:

"If you find by such preponderance of the testimony that the plaintiff was guilty of contributory negligence, and that

contributory negligence directly and proximately contributed to this injury, then you should find for the defendant."

And the court, in accordance with the former decision in this case, proceeded to instruct the jury that, in determining the question of contributory negligence on the part of the boy, it was their duty to take all the circumstances surrounding him, viz., his experience or lack of experience, his knowledge or lack of knowledge, into consideration.

It is also contended that the court did not tell the jury what degree of knowledge the boy must possess in order to make him responsible for his own acts. This would be impossible for the court to do. There is no particular degree of intelligence that can be stated as an abstract proposition. The court did all that it could do in this regard when it stated to the jury that they should take into consideration the amount of prudence and care and judgment which would ordinarily and reasonably be expected from a boy of that age, under the circumstances and conditions shown by the testimony in this case. The instructions 1, 2, and 3, offered by the appellant, so far as they stated the law, were substantially embraced in the instructions given by the court.

There being no error in the trial of the cause, the judgment is affirmed.

RUDKIN, C. J., CROW, CHADWICK, and FULLERTON, JJ., concur.

[No. 7815. Decided February 24, 1909.]

JOHN LARAULT, *Respondent*, v. J. W. PALMER, *Appellant*.[1]

SET-OFF AND COUNTERCLAIM — TENDER — AS BAR — PLEADING. A tender by defendant of a sum admitted to be due on a contract involving items that can be segregated does not bar a counterclaim for a larger sum arising out of the same transaction, Bal. Code, § 5176, only requiring a tender of the amount admitted to be due.

APPEAL—PRESERVATION OF GROUNDS—OFFER OF PROOF. After the court has sustained objections to a counterclaim and ruled that no evidence will be received thereunder, an offer of proof is not necessary to secure a review of the ruling on appeal.

Appeal from a judgment of the superior court for Adams county, Zent, J., entered May 18, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for services. Reversed.

O. R. Holcomb, for appellant.

Adams & Naef, for respondent.

CHADWICK, J.—Plaintiff brought this action to recover the sum of $211 alleged to be due for services rendered as a veterinary surgeon. He alleges in his complaint that a customary and reasonable charge for the services is the said sum of $211. Defendant answered, admitting that between the 14th day of September, 1906, and the 27th day of October, 1906, plaintiff had treated several of his horses, but denied that his services were of any value except that plaintiff had done dental work upon two of his horses and that such dental work was of the reasonable value of $5, which sum, with all accrued costs and statutory attorney's fees, he tendered into court. Defendant further alleged as an affirmative defense, that plaintiff had held himself out as one possessed of reasonable skill and knowledge of veterinary science; that defendant relied upon such representations and employed

[1]Reported in 99 Pac. 1036.

him to treat three head of horses which were afflicted with some disease then unknown to defendant; that in truth plaintiff did not diagnose the disease with which said horses were afflicted in a proper way; that he treated them as if afflicted with a harmless disease, when in fact they were sick with an infectious disease of a most malignant and fatal type, known as glanders; that by reason of plaintiff's ignorance in diagnosis and improper treatment, certain other horses belonging to defendant, to the number of six head, contracted the said infectious disease, and that six of his horses died; that the value of the horses so lost by reason of the careless, unskilled, and negligent treatment of plaintiff was the sum of $1,200. For this sum, less the amount admitted to be due for dental services, he demanded judgment.

Upon the trial the court announced that no testimony would be allowed upon the defense tendered by the affirmative answer. Exceptions being reserved, the case proceeded to trial, resulting in a verdict in favor of plaintiff for the full sum demanded, upon which judgment was thereafter entered.

The several assignments of error all go to the ruling of the court in excluding evidence under the further and separate answer of the defendant. In thus ruling we think the court erred. A tender of a part of the amount claimed to be due under a contract involving items which may be segregated, is no more than an admission of a contract and that the amount tendered is due thereon. The value of the services rendered still being an issue, the appellant could under the statute plead any counterclaim, upon any cause of action arising out of the contract or transaction set forth in the complaint or connected with the subject of the action. Bal. Code, § 4913 (P. C. § 880). While there is a division of authority, this is in accord with the better rule, and in our judgment, consistent with the proper interpretation of Bal. Code, § 5176 (P. C. § 1113), which puts no greater burden on a defendant than to tender the amount which he admits

to be due, rather than the exact amount which may be found to be due. The old rule was harsh and unjust. To relieve a party of the hazards attending a tender, courts gradually came to declare the more liberal rule adopted and announced in *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421, but which is more aptly stated in *Simpson v. Carson*, 11 Ore. 361, 8 Pac. 325: "The tenders and payment into court only admitted the cause of action as to the sum tendered. It did not conclude the respondent as to any defense she might have against a further recovery." *Spalding v. Vandercook*, 2 Wend. 431; *Eaton v. Wells*, 82 N. Y. 576; *Roosevelt v. New York etc. R. Co.*, 45 Barb. 554; *Davis v. Millaudon*, 17 La. Ann. 97, 87 Am. Dec. 517; *Hinds v. Cottle*, 148 Mass. 310, 9 N. E. 654.

Respondent urges that appellant cannot be heard to raise this question on appeal because he did not make an offer to prove his counterclaim in the court below. It is a general rule that an appellate court will not review an issue at the instance of a party who has made no offer to sustain it by proof. But that rule can have no bearing here. The court had in express words excluded appellant's counterclaim, and announced that he would "not be permitted to introduce any proof tending to sustain the counterclaim," to which an exception was taken. This was sufficient. An offer to prove an issue which the court has excluded is a practice that should not be encouraged. However guarded the offer may be, it tends to prejudice and influence the jury and indirectly get before the jury the evidence which the court, under whose theory the case must be tried, has held to be incompetent, irrelevant, or immaterial. In accepting the announcement of the court as final, appellant was within the bounds of propriety. He should not be deprived of his right to have the error of the court considered because of his decorum. The principle involved was before this court in the case of *Norman v. Hopper*, 38 Wash. 415, 80 Pac. 551, wherein it was announced that, where the facts which a party relies on are

contained in his pleadings, thus becoming a part of the record, the general rule as hereinbefore stated does not apply.

The judgment is reversed, with instructions to the court below to try the issues made by the pleadings.

RUDKIN, C. J., FULLERTON, CROW, DUNBAR, MOUNT, and GOSE, JJ., concur.

[No. 7855. Decided February 24, 1909.]

THE TIMES PRINTING COMPANY, *Respondent*, v. THE STAR PUBLISHING COMPANY, *Appellant*, THE CITY OF SEATTLE *et al.*, *Defendants*.[1]

NEWSPAPERS—WHAT CONSTITUTES—CONTENTS. The noon edition of a newspaper, of eight pages, 18 inches by 23, issued regularly every day, containing telegraphic, sporting, political and theatrical news, advertisements and editorials, with an average daily circulation of over one thousand copies, sold on the street, without a subscription list at the time of submitting its bid, is a newspaper, in contemplation of our statutes relating to city printing.

EVIDENCE—JUDICIAL NOTICE—POPULATION. The court will take judicial notice of the population of its cities as shown by a pamphlet issued under the auspices of the state, and of the approximate increase since the date of such issue.

NEWSPAPERS — WHAT CONSTITUTES — GENERAL CIRCULATION. A newspaper published in a city having a population of 275,000, having an average daily circulation of 1,000 copies, sold on the street, and a subscription list of 360, at the time of the acceptance of its bid, but with no circulation in the residence districts and rarely seen in business or professional offices, is not a newspaper of general circulation, within the meaning of charter provisions requiring city printing to be let to such papers; and the city is properly enjoined from entering into a contract for public printing awarded by the city council to such a paper (FULLERTON and CHADWICK, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Kennan, J., entered October 13, 1908, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to enjoin the letting of a contract for city printing. Affirmed.

[1]Reported in 99 Pac. 1040.

Ballinger, Ronald, Battle & Tennant (C. J. France, of counsel), for appellant.

Bausman & Kelleher, for respondent.

Gose, J.—This is an action brought by the respondent against the defendants and appellant to enjoin the defendants from entering into a contract with appellant to do the city printing of the city of Seattle for the year 1909. The city of Seattle, a city of the first class, is acting under an independent charter. The charter provides for the printing of all municipal legal notices, the manner of awarding contracts therefor, and for the designation of the city official newspaper. Section 31 of article 4, of the charter prescribes that such newspaper must be "A daily newspaper of general circulation and published in the city, to be styled city official newspaper." Such section further provides that the Board of Public Works shall, on the first Monday of August of each year, cause to be published a call for sealed proposals to do the city printing for the then next ensuing fiscal year.

In obedience to this provision, the board caused such notice to be published, and on August 10, 1908, the appellant filed its bid, in every way in compliance with the charter provision, proposing to publish in the Noon Star "all the city printing" for the next fiscal year. On August 29, all the bids, five in number, were opened, and the bid of the appellant, it being the lowest bidder, was accepted by the board.

On October 11th the case was tried to the court, which found that the Noon Star is only a preliminary or special edition of a newspaper called "The Seattle Star," and is not a newspaper on its own account, and enjoined the parties from entering into the contract. From this order this appeal is prosecuted.

Two principal points are urged: First, that the Noon Star is an edition of a newspaper, and not a newspaper proper; second, that it is not a newspaper of general circulation, within the meaning of the charter provision. We will

consider these points in the order stated. The Noon Star is issued regularly every day, is an eight page paper, eighteen by twenty-three inches in size, with eight columns to the page, and contains telegraphic, sporting, political, and theatrical news and advertisements, and has an editorial column. The Star Publishing Company published both the Seattle Star and the Noon Star. Prior to June 20, 1908, the Noon Star was known as the Noon Edition of the Evening Star, and was principally devoted to sporting news.

The evidence shows that, at the time of filing its bid, the Noon Star had no regular subscription list, but that about one thousand papers were sold daily on the streets by newsboys. At the time of the trial, it had a subscription list of 360, and an average daily circulation of 1,083. In view of these facts, we do not regard it as important whether it was an edition of the Evening Star or an independent newspaper. Its size, the regularity of its issuance, and the variety of its news were such as to make it clear that it was a newspaper at the time it submitted its bid, and the fact that it contained news some of which was published the previous day in the Evening Star does not militate against this view. This court, in the case of *Puget Sound Publishing Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802, quoted with approval the following definition of a newspaper:

"A newspaper, in the popular acceptance of the word, is a publication issued at regular stated intervals, containing, among other things, the current news, or the news of the day. 21 Am. & Eng. Ency. Law (2d ed.), p. 533."

In *Hanscom v. Meyer*, 60 Neb. 68, 82 N. W. 114, 48 L. R. A. 409, the court say:

"The principal distinguishing feature of a newspaper, in contemplation of the statute, in our opinion, is that it be a publication appearing at a regular, or almost regular, intervals, at short periods of time, as daily or weekly, usually in sheet form, and containing news; that is, reports of happenings of recent occurrence of a varied character, such as

political, social, moral, religious, and other subjects of a similar nature, local or foreign, intended for the information of the general reader."

In *United States Mortgage & Trust Co. v. Marquam*, 41 Ore. 391, 69 Pac. 37, 41, this language was used:

"Mr. Justice Mitchell, in *Hull v. King*, 38 Minn. 349, 350, 37 N. W. 792, in attempting to give a very general definition of a newspaper, says that according to the business world, and in ordinary understanding, it is 'a publication, usually in sheet form, intended for general circulation, and published regularly at short intervals, containing intelligence of current events and news of general interest.'"

See, also, *Williams v. Colwell*, 18 Misc. Rep. 399, 43 N. Y. Supp. 720.

We next pass to the consideration of the second question, viz., was it a newspaper of general circulation at the time of the filing and acceptance of its bid? The evidence, as we have said, shows that about one thousand copies were daily sold on the streets by the newsboys, and that at the time of the acceptance of the bid it had no subscription list; that at the time of the trial, some two months later, it had a subscription list of 360 and an average daily circulation of 1,083. Furthermore, it appeared that, at the time of the acceptance of the bid, it had no circulation in the residence districts, and was rarely seen, either in business houses or the offices of professional men. In September, 1907, the city of Seattle had a population of 242,000 according to the "Review of the Resources and Industries of Washington," issued under the auspices of the state. At the time of the acceptance of the bid, it had a population of about 275,000. We think we may take judicial notice of this fact. The rule in respect to judicial notice is stated in 16 Cyc. 870 as follows: "The court will take judicial notice of the population of counties, cities, and towns, and of the approximate rate at which the population of such places increase." See, also, *Union Pac. R. Co. v. Montgomery*, 49 Neb. 429, 68 N. W. 619.

The controlling purpose of the city in letting a contract of this nature is to give the public notice of certain of its official and proposed official acts. Webster defines the word "general" as being equivalent to extensive. It is a relative term, and its meaning must be determined by a process of inclusion and exclusion. That which would be a general circulation in a town of 5,000 or 10,000 people can hardly be said to be general in a populous city. The appellant urges, however, that this question has been settled favorably to its contention in the case of *Puget Sound Publishing Co. v. Times Printing Co.*, *supra*. We think the two cases are distinguishable. The former case was decided in 1903 when the population of Seattle was estimated at 121,813, according to the "Review of Resources," *supra*. At pages 555 and 556 the court, in discussing this question, uses the following language:

"The court further found, that The Bulletin circulates among all classes of people in the city of Seattle; that it has between 750 and 1000 subscribers in the city of Seattle, and is daily delivered to such subscribers, with the exception of legal holidays, and is daily read in the city of Seattle by about 3,000 persons; that it daily contains a resume of the world's telegraphic news, briefly stated; that it contains an editorial column devoted to the discussion of events and topics of interest to the general public; that it has been, by order of the superior court of King county, frequently designated as, and declared to be, a newspaper of general circulation; that for more than three years notices of all classes, required by law to be published in a newspaper of general circulation, have been published regularly in The Bulletin; among which appear summons for publication, foreclosure notices, all manner of probate notices required by law to be published, notices of foreclosure of delinquent tax certificates, and all other such notices as are usually found in a newspaper of general circulation; and that in each instance an order of the superior court of King county has declared The Daily Bulletin to be a newspaper of general circulation in King county. The testimony introduced at the trial, and the copies of the paper sent up as exhibits, seem to support the

findings of the court as to the character of The Daily Bulletin."

An examination of the language quoted will show the difference in the kind and extent of circulation. The Bulletin had a regular list of subscribers, and was read by 3,000 people. There is no evidence in the case at bar that the Noon Star was read by more than one thousand people. The circulation of the Bulletin was general among the people. The circulation of this paper is confined to those who buy it from the street. For more than three years the Bulletin had published all kinds of legal notices which the law required to be published. Our attention has not been called to the fact that any such publication has been made in the Noon Star.

In the case of *Norton v. Duluth*, 54 Minn. 281, 56 N. W. 80, also relied upon by the appellant, the statute defined the qualification of a newspaper for doing official printing as one regularly issued, published, and delivered to 240 paying subscribers. In the case of *Pentzel v. Squire*, 161 Ill. 346, 43 N. E. 1064, 52 Am. St. 373, cited in the appellant's brief, it was shown that the paper circulated among "lawyers and laymen," and had an average weekly circulation of 3,875. In *United States Mortgage & Trust Co. v. Marquam*, *supra*, at page 42 of the opinion, the court uses the following language: "The circulation of the Sunday Welcome through the mails, by delivery, and by news stands is from 1,000 to 1,100 copies, and is not confined to any particular class or sect of individuals." This case was decided in 1902. In *Williams v. Colwell*, *supra*, the court was considering the question as to whether the publication was in a newspaper within the meaning of the law, and at page 721 said: "And that it has a circulation in the city of Buffalo of 1,000, and in the county outside the city of 500, and in other parts of the state of New York and in twenty-four other states and the province of Ontario, Canada, of 3,600." Neither the Oregon statute nor the New York statute in direct terms

require a paper to have a general circulation. However, the courts in construing them assume that this is an implied qualification.

In view of the charter provision requiring that the paper selected shall be one of general circulation, the purpose of the publication of official notices, the population of the city of Seattle at the time of the acceptance of the proposal, and treating the word "general" as being equivalent in meaning with extensive, and giving to this word a reasonable interpretation, we are constrained to hold that the Noon Star was not a newspaper of general circulation at the time of the acceptance of its proposal to do the city printing. Indeed, we could not reach a different conclusion without unduly restricting the meaning of the word "general." This conclusion requires an affirmance of the judgment, and it is so ordered.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to distinguish the question presented in this case from that presented and decided in the case of *Puget Sound Publishing Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802, where we held "The Daily Bulletin" to be a paper of general circulation. In my opinion that case should be followed and not distinguished, and I dissent, therefore, from the judgment directed by the majority.

CHADWICK, J. (dissenting)—I cannot agree with that part of the majority opinion that assumes to hold that the Noon Star is not a newspaper of general circulation. It may or may not be so. In my judgment this is not a judicial question. It was determined by the city council of Seattle that it was a newspaper of general circulation. The determination of that fact having been reserved to the legislative body, its finding, in the absence of fraud, is conclusive upon the court. Otherwise no contract of the city within the limit

of its legislative power would be of any validity until revised or passed upon by the courts. I think the rule laid down in *State ex rel. News Pub. Co. v. Milligan*, 3 Wash. 144, 28 Pac. 369, is the true rule in this class of cases. In that case the city council of Tacoma had, under a charter provision declaring it to be the duty of the city council to designate the newspaper published by the party receiving the contract for city printing, let the contract to one who was in fact not the publisher of any newspaper—an extreme case—yet this court held:

"No principle of equity jurisprudence is better established than that courts of equity will not sit in review of proceedings of subordinate political or municipal tribunals, and that where matters are left to the discretion of such bodies the exercise of that discretion in good faith will not, in the absence of fraud, be disturbed. High on Injunctions (3d ed.) § 1240. In this case we think the council was acting within the scope of its lawful authority, so that the rule laid down by Mr. High in the next section, 1241, 'that the restrictions thus placed upon equitable interference with the action of municipal corporations do not extend to cases where the act sought to be enjoined is in excess of the corporate power,' has no application to this case. Possibly some inconvenience may on occasion arise by pursuing the policy adopted by the city council of Tacoma in this case; but to hold that the bidders must have the qualification of publishers would be to encourage a monopoly in the bidding business which might defeat the very object of the law and deprive the city of the benefit of competition, and make the requirement of bidding a mere farce. In this case we think the law authorizes the action of the city council, that they are acting within the limits of their discretion, and that the court therefore did not have jurisdiction of the subject-matter of the action, and that its action is therefore void."

The case of *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802, assumed to treat the question before us as a judicial question, without reference to the *Milligan* case. That case is, in my opinion, not only an unwarranted departure from, but is inconsistent with, the re-

peated holding of this court that it will not, in the absence of fraud, review the conclusion of a coordinate branch of the government, when it is the result of its discretion or entered upon a disputed state of facts. *Nichols v. School District*, 39 Wash. 137, 81 Pac. 325; *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757; *Heffner v. Board of County Com'rs.*, 16 Wash. 273, 47 Pac. 430; *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340.

[No. 7569. Decided February 25, 1909.]

LITTLE BILL, OR MAQUIQUI, *Appellant*, v. JESSIE A. DYSLIN *et al.*, *Respondents*.[1]

JUDGMENTS—VACATION—GROUNDS—NEW TRIAL—SURPRISE—COURTS—REVIEW BY SAME COURT. Bal. Code, § 4953, authorizes a trial court to review and vacate its own order denying a new trial, taken against a party through mistake, inadvertence, surprise or excusable neglect.

SAME—DISCRETION. It is not an abuse of discretion to vacate an order denying a new trial, entered without notice to the moving party, after an agreement to submit the same at some future time to a visiting judge who died before the matter was submitted.

SAME—COURTS—POWER TO REVIEW ORDERS—CORRECTION IN SAME COURT. After vacating, for inadvertence and surprise, an order vacating the denial of a new trial, the trial court has no discretion to vacate its last order, as it may not review its own orders for mere error of law.

Appeal from an order of the superior court for Pierce county, Clifford, J., entered April 4, 1908, vacating, upon motion of the plaintiff, an order vacating an order denying defendant's motion for a new trial, and refusing to consider the motion for a new trial. Reversed.

E. D. Wilcox, for appellant.

Boyle, Warburton, Quick & Brockway, for respondents.

[1]Reported in 99 Pac. 1026.

RUDKIN, C. J.—This case came on for hearing in the superior court of Pierce county on the 4th day of December, 1906, before Judge Hatch, superior judge for Jefferson, Clallam and Island counties, holding court in Pierce county at the request of the judges thereof, or by direction of the governor. On the 6th day of December, 1906, a judgment of nonsuit was entered, and within two days thereafter the plaintiff interposed a motion for a new trial. The motion was noted for hearing on the 14th day of December, 1906, but on that date the judge presiding in the department in which the motion was pending refused to hear or consider the motion on the ground that the cause was heard before another judge. It was thereupon agreed between the parties that the motion should be taken up before Judge Hatch at some future time, or submitted on briefs; but Judge Hatch died soon after, and before this agreement was carried out.

On the 16th day of March, 1907, the defendants took an order denying the motion for a new trial, in the absence of and without notice to the plaintiff; and the plaintiff and his attorneys had no notice of such action until some considerable time thereafter. On the 4th day of December, 1907, the plaintiff moved the court to vacate the order of March 16, denying the motion for a new trial, on the ground of mistake, inadvertence, surprise and excusable neglect. A hearing was had on this application and the same was granted on the 2d day of January, 1908. On the 2d day of February, 1908, the plaintiff's motion for a new trial came on for argument, and the court permitted counsel for the present respondents to reargue the motion theretofore heard, upon which the order of March 16, 1907, denying the motion for a new trial had been vacated. On the 4th day of April, 1908, the court entered an order vacating the order of January 2, 1908, which in turn vacated the order of March 16, 1907, denying the motion for a new trial, and refused to hear or consider the motion for a new trial itself. From this latter order, the present appeal is prosecuted.

The two propositions upon which the respondents rely for an affirmance of the order are: (1) That the order of January 2, vacating the order denying the motion for a new trial, was void for lack of jurisdiction; and (2) that the court abused its discretion in making and entering the order of vacation on January 2.

The first contention of the respondents is based on the decisions of this court in *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363, and kindred cases, where it is held that neither the judge who tried the cause nor his successor in office can vacate a previous order granting or refusing a new trial for mere error of law. But Bal. Code, § 4953 (P. C. § 424), expressly provides that courts may relieve a party from a judgment or order taken against him through mistake, inadvertence, surprise, or excusable neglect, and the cases cited by the respondents do not limit or curtail the power of the court to vacate judgments or orders under this section. *Burnham v. Spokane Mercantile Co.*, *supra.*

The second contention is that the court abused its discretion in vacating the order denying the motion for a new trial. If that argument is addressed to this court, we are not inclined to so rule. The judge who heard the cause returned to his home county before the motion for a new trial could be heard, and another judge presiding in the same court refused to hear a motion in a cause not tried before him. It was then agreed that the motion should be taken up before the judge who heard the cause, or submitted to him on briefs, but before the stipulation could be carried out the judge died, and an order was thereafter taken, in the absence of counsel for the appellant and without notice to them, denying the new trial. Under such circumstances we are not prepared to say that the court should not vacate the order denying the motion for a new trial on the ground of accident, surprise and excusable neglect, in order that the motion might be disposed of on its merits. It is said that the several defendants in the ac-

tion were represented by different counsel and that counsel representing the present respondents were not parties to the agreement or stipulation under which the cause was to be submitted to Judge Hatch, but the affidavit filed in support of the motion to vacate averred that the agreement was made with "the attorney for the defendants who had the active management of the defense," and this affidavit was not controverted or denied.

If the argument that the court abused its discretion in vacating the order denying the motion for a new trial is urged as a justification for the final order of the court from which this appeal is prosecuted, the answer is that the discretion had already been exercised and the court was not at liberty to reverse itself or exercise its discretion anew on the hearing of the motion for a new trial. *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164. Had the court, in the exercise of its discretion, refused to vacate the order denying the motion for a new trial in the first instance, it is very apparent that it could not thereafter reconsider its action and grant the motion for mere error of law, under the decision in *Burnham v. Spokane Mercantile Co.*, *supra*, and later cases, and why should a different rule obtain because the court exercised its discretion in favor of the other party. We perceive no reason for any such distinction, and the order is accordingly reversed, with directions to hear the motion for a new trial on its merits.

FULLERTON, DUNBAR, and MOUNT, JJ., concur.

GOSE, CHADWICK, and CROW, JJ., took no part.

[No. 7715. Decided February 25, 1909.]

MARY McKAY, *Respondent*, v. ANDERSON STEAMBOAT COMPANY, *Appellant*.[1]

APPEAL—REVIEW—VERDICT. The supreme court will not set aside a verdict because of conflict in evidence supporting it.

CARRIER—NEGLIGENCE — LANDING PASSENGERS — EVIDENCE — QUESTION FOR JURY. Negligence in landing a passenger from a steamer is for the jury, where there was testimony to the effect that the boat tied up at the wharf and starting up shifted away while plaintiff was attempting and before she had an opportunity to alight, precipitating her into the water.

TRIAL—INSTRUCTIONS—ASSUMPTION AS TO FACTS. It is not error in instructions to the jury to refer to one of the parties to the action as a "lady."

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It is harmless error to give a technically incorrect instruction exonerating the appellant if it had established contributory negligence, where appellant had offered no evidence of contributory negligence, and there was none.

CARRIERS—NEGLIGENCE — LANDING PASSENGERS — SHIPPING — EVIDENCE OF CUSTOM. Evidence of custom in landing passengers at a wharf is properly excluded where there was simply a dispute as to the facts on the issue as to negligence, the testimony of either party, if true, warranting a favorable verdict.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 4, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action by a passenger on a boat to recover for personal injuries. Affirmed.

Byers & Byers, for appellant.

Aust & Terhune, for respondent.

RUDKIN, C. J.—The defendant in this action owns and operates a line of steamboats on Lake Washington, and is a common carrier of passengers for hire. On the 4th day of November, 1907, the plaintiff became a passenger on one of

[1]Reported in 99 Pac. 1030.

the defendant's boats for the purpose of being transported over the lake from Kirkland to Houghton. When the boat reached the wharf at Houghton, the plaintiff attempted to land by stepping from the rail of the boat to the wharf, and in so doing was precipitated into the lake between the boat and the wharf, receiving personal injuries for which a recovery was sought in this action. The jury returned a verdict for the plaintiff, assessing her damages in the sum of $1,200, but the court below granted a new trial unless she would remit the sum of $600 from the amount of the verdict. The plaintiff elected to accept the lesser amount, and judgment was given in her favor for the sum of $600, from which this appeal is prosecuted.

The first error assigned is the refusal of the court to direct a verdict in favor of the appellant. In discussing this assignment, it seems to us that the appellant has entirely lost sight of the fact that there is a verdict in the record based on conflicting testimony. If it were an admitted fact that the respondent, of her own volition, attempted to step a distance of three or more feet from the rail of the boat to the wharf, while the boat was in motion and before a landing was made, as the testimony of the appellant tends to show, this case would in all probability never have reached this court. If, on the other hand, the boat tied up at the wharf, received two passengers, and untied again for the purpose of proceeding on her journey, and the respondent attempted to land from the boat at the instance of the purser while the boat was lying motionless within a foot or less of the wharf, and was precipitated into the lake by the boat starting up and shifting away from the wharf before she had an opportunity to alight, the question of negligence on the part of the appellant and of contributory negligence on the part of the respondent was clearly for the jury, and there was competent testimony tending to establish these facts.

The appellant next assigns error in certain instructions wherein the court used the term "lady," in referring to the

respondent. This assignment is without merit. In a country where titles of nobility are unknown, where every woman is a lady, in vulgar phrase, a jury is not likely to be swept from its feet because, forsooth, the court in its charge refers to one of the parties litigant as a lady. Such an appellation would not even challenge the attention of the average juror, much less influence his sober judgment.

The court gave the following instruction to the jury:

"If the plaintiff has failed to prove to you by a fair preponderance of the evidence that the defendant was negligent as alleged by her, or has failed to prove to you that she was injured through the negligence of the defendant as alleged by her, or has failed to prove to you that she has sustained damages by reason of such injury, or if the defendant has proved to you by a fair preponderance of the evidence that the plaintiff herself was negligent, and that negligence on her part directly and not remotely caused or contributed to the injury which she has received, then you should return a verdict in favor of the defendant."

The appellant excepted to that portion of the charge wherein the court said: "If the defendant has proved to you by a fair preponderance of the evidence that the plaintiff herself was negligent," etc. The instruction complained of is not technically correct of course, as the jury must consider the entire testimony in determining the question of contributory negligence or any other issue in the case. But we fail to see how the jury could be misled by the instruction complained of. The appellant has pointed out no evidence in the respondent's case tending to show contributory negligence on her part, and after a careful examination of the record, we have discovered none. The error was therefore harmless.

The refusal of the court to admit testimony tending to show the appellant's custom in making landings and discharging passengers is next assigned as error. We fail to see how the question of custom had anything whatever to do with this case. If the respondent's testimony was true, she was entitled to a verdict; if the appellant's testimony was true,

she was not; and the question of custom has no place in the record. The remaining assignments require no separate consideration; and finding no error in the record the judgment is affirmed.

FULLERTON, CHADWICK, GOSE, DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 7798. Decided February 25, 1909.]

ZORA E. LOEPER, *Respondent*, v. W. F. LOEPER, *Appellant*.[1]

QUIETING TITLE—PLEADINGS—ISSUES AND PROOF—ACTIONS—RELIEF UNDER CROSS-COMPLAINT—VARIANCE. Where a complaint by a wife for separate maintenance or a partition of real property is dismissed, and the cause is tried on the husband's cross-complaint seeking to quiet his title to separate property, a personal judgment against the husband is outside of the issues, there being nothing in the cross-complaint or reply to warrant it; and it is error to award the plaintiff affirmative relief.

APPEAL—RECORD—BILL OF EXCEPTIONS—NECESSITY. Where there are no findings of fact and no bill of exceptions or statement of facts, error in awarding a party relief outside of the issues requires a reversal of the judgment.

COSTS—WHEN DISCRETIONARY. Upon dismissing a complaint, and quieting defendant's title on a cross-complaint, costs to defendant are discretionary.

Appeal by defendant from a judgment of the superior court for Spokane county, Poindexter, J., entered April 9, 1908, after a trial on the merits before the court without a jury, granting the plaintiff a money judgment and quieting title in the defendant, in an action by a wife for separate maintenance or a partition of property. Reversed.

Danson & Williams, for appellant.

F. W. Dewart, for respondent.

[1]Reported in 99 Pac. 1029.

RUDKIN, C. J.—A reference to the amended complaint in this case leaves one in doubt as to the exact nature or object of the action. It might be inferred, therefore, that it was an action by the wife for separate maintenance, or an action for a division or partition of community property, or a combination of the two. But inasmuch as the court below denied the relief demanded in the amended complaint, and no appeal has been prosecuted from that portion of its decree, the question becomes immaterial. In his answer and cross-complaint, the defendant alleged that he was the owner in fee of certain real property therein described, and prayed that his title thereto be quieted against the claims and demands of the plaintiff. The judgment of the court was as follows:

"That the plaintiff, Zora E. Loeper, is entitled to none of the relief as demanded in her amended complaint herein and that her said action is hereby dismissed.

"That the following described real estate, to wit: East half of Northwest quarter of Section 19, Township 24, North of Range 44 E. W. M., less Northeast quarter of the Northeast quarter of said Northwest quarter, is the sole and separate property of the said defendant, W. F. Loeper, and the title of said defendant in and to said real estate is hereby quieted and all clouds thereon by reason of any claim of plaintiff are hereby removed, but the said real estate is so decreed to be the separate property of the defendant on condition that the said defendant pay into the registry of this court for the said plaintiff $500, for which amount judgment is entered in favor of plaintiff and against the defendant, with interest from this date at the legal rate."

The defendant has appealed from the entire judgment and from that portion thereof awarding the plaintiff a personal judgment against him in the sum of $500. The case comes before us on the pleadings and the judgment roll.

The claim of the respondent was eliminated from the case by the judgment dismissing her complaint, and the only question for consideration here is the regularity and validity of the judgment entered on the cross-complaint, and more particularly that feature of it awarding a personal judgment to

the respondent. We find nothing in the cross-complaint, or in the reply thereto, which consists of a general denial, to warrant the rendition of a personal judgment in favor of the respondent. The court might doubtless have granted the relief prayed for in the cross-complaint, either generally or conditionally, or it might have denied such relief *in toto*, but it could not properly award affirmative relief against the appellant, because there was nothing in the pleadings to warrant such action on its part. In other words, if the court found that the appellant was the owner of the property described in the cross-complaint, as his separate estate, and also found that the respondent or the community of which she is a member had some claim or lien against the property, it might doubtless have quieted the title in the appellant, on condition that he satisfy the adverse claim or lien. But under the pleadings, it could not award affirmative relief to the respondent. No findings of fact were made by the trial court, and there is no statement of facts or bill of exceptions in the record; so that this court can only look to the pleadings and judgment for guidance. From these we are unable to say that the court would have granted the appellant judgment quieting his title, independent of the payment to the respondent of the sum of $500, nor does it appear that he was entitled to such relief.

The judgment must therefore be reversed in its entirety in so far as the cross action is concerned, and it is so ordered. Appellant complains of the refusal of the court to award him costs in the court below, but that matter was entirely discretionary with the trial court. Reversed.

FULLERTON, CHADWICK, GOSE, DUNBAR, CROW, and MOUNT, JJ., concur.

ON PETITION FOR REHEARING.

[Decided May 1, 1909.]

PER CURIAM.—The opinion heretofore filed is modified to the extent that neither party will recover costs in this court. In all respects the petition for rehearing is denied.

[No. 7840. Decided February 25, 1909.]

HANS B. STRAND *et al.*, *Appellants*, v. CRASSUS STEWART, *as Executor of the Last Will and Testament of Daniel Stewart, Deceased, et al., Respondents.*[1]

EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION—LIMITATION OF ACTIONS. Claims against the executors of a nonintervention will are barred if not presented within the year limited by notice to creditors.

SAME—CONSTITUTIONAL LAW—PROCEDURE—VESTED RIGHTS. Laws 1897, p. 285, providing for the publication of notice to creditors by executors of a nonintervention will applies to wills executed prior to the passage of the act, as it relates to a mere matter of procedure; and the same does not affect vested rights where the testator died after the act went into effect.

WILLS—WHAT LAW GOVERNS—DATE OF TESTATOR'S DEATH. The right to make a testamentary disposition of property is governed by the laws in force at the date of the testator's death, and wills must conform thereto.

EXECUTORS AND ADMINISTRATORS—CLAIMS—NOTICE TO CREDITORS—SOLVENCY OF ESTATE—NONINTERVENTION WILLS. An adjudication of solvency of an estate, in the case of a nonintervention will, need not precede the publication of notice to creditors, which, by Bal. Code, § 6226, is required immediately upon appointment.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered April 15, 1908, dismissing an action upon a claim against an estate, upon sustaining a demurrer to the complaint. Affirmed.

Bugge & Schwartz and *Allen H. Reynolds*, for appellants.

Brooks & Bartlett, for respondents.

RUDKIN, C. J.—On the 2d day of April, 1896, Daniel Stewart executed what is commonly known as a nonintervention will. On the 27th day of April, 1906, the testator died in Walla Walla county, leaving real and personal estate therein subject to administration. On the 14th day of May,

[1]Reported in 99 Pac. 1027.

1906, the will was admitted to probate in the superior court of Walla Walla county, and letters testamentary issued to Crassus Stewart, the executor therein named. On the 19th day of May, 1906, the executor published notice to creditors, requiring all persons having claims against the estate to present them within one year from the date of the first publication of such notice. On the 5th day of October, 1906, the superior court adjudged the estate to be solvent, and directed the executor to settle and administer the same in the manner provided by the will without the further intervention of the court. On the 24th day of September, 1907, or more than one year after the first publication of notice to creditors, the claim now in suit was presented to the executor, and was by him rejected. This action followed to recover the amount of the claim. A demurrer to the complaint was sustained in the court below, on the ground that the action was not commenced within the time limited by law, and from a judgment of dismissal, this appeal is prosecuted.

The act of March 16, 1897, Laws of 1897, p. 285, relating to nonintervention wills, provides,

"That in all such cases the claims against such estates shall be paid within one year from the date of the first publication of the notice to creditors to present their claims, unless such time be extended by the court, for good cause shown, for a reasonable time."

Also,

"That upon a publication of notice to creditors to present their claims to such executor, for a period of time and in the manner required of executors and of administrators holding letters testamentary and of administration under the laws of this state, said creditors shall be required to present their claims to the said executor within one year from the date of the first publication of the said notice, and if they fail to do so their claims shall be barred."

From the foregoing statement of the case, it would seem that the cause of action set forth in the complaint is barred

by the act of 1897, *supra*. The appellants contend, however, that the action is not barred, and that the notice to creditors was ineffectual for two reasons: first, because the will was executed prior to the passage of the act of 1897, consequently the executor had no authority to publish notice to creditors; and second, because the notice to creditors was unauthorized in any event until after the adjudication of solvency.

The first contention is based largely on the decisions of this court in *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337, and *State ex rel. Cox v. Superior Court*, 21 Wash. 575, 59 Pac. 483. These cases hold that the right to have an estate settled and administered without the intervention of the probate court, and without letters testamentary or of administration, is a vested right which cannot be taken away by subsequent legislative enactment. These decisions have no application to the case at bar, for two reasons. In the first place, the provision for notice to creditors and barring all claims not presented within the year, relates to a mere matter of procedure, and is not obnoxious to any provision of the constitution of the United States or of this state, whether the provision be made applicable to estates already in process of administration or to estates to be administered upon in the future. In the second place, the act of 1897 took effect long before the death of the testator, and as to his estate the act does not divest or interfere with vested rights. The right to make a testamentary disposition of property is neither a natural nor a constitutional right. Such right is derived from and rests in positive law. A will is said to be ambulatory until the death of the testator, and until that event occurs the testamentary disposition is subject to the will of the testator, and likewise to the will of the state as expressed in its public laws. The will speaks as of the date of the testator's death, and must conform to the laws in force at that time. These rules are elementary and need no citation of authority in their support. While the legislature may not interfere with or divest estates which have already become vested

through the death of the testator, its power over wills, the manner of their execution, and the mode of carrying out their provisions, is absolute and supreme until death occurs. It is manifest, therefore, that the legislature could extend the provisions of the act of 1897 to wills already executed, in so far as the requirement of notice to creditors and the barring of claims is concerned; and it is equally manifest that the legislature intended so to do.

The second contention is equally unsound. There is no reason why the publication of notice to creditors should be delayed until after an adjudication of solvency, nor is there anything in the act itself to justify such a contention. The only purpose of the adjudication of solvency is to determine whether the estate shall be administered according to the provisions of the will, or according to the provisions of the statute. The executor is the representative of the estate before the adjudication of solvency, as well as afterwards, and notice to creditors must be published whether the estate be solvent or insolvent. The duties of the executor are prescribed by the general laws of the state, which require him to publish notice to creditors immediately upon his appointment. Bal. Code, § 6226 (P. C. § 2531).

There is no error in the record, and the judgment is affirmed.

FULLERTON, CHADWICK, GOSE, DUNBAR, CROW and MOUNT, JJ., concur.

[No. 7521. Decided February 2, 1909.]

WILLIEMENA H. E. EMERSON *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

Appeal from an order of the superior court for King county, Morris, J., entered May 5, 1908, confirming an assessment for benefits by a local improvement in condemnation proceedings instituted by a city, upon an appeal from an order of the city council confirming the assessment. Reversed.

Geo. E. de Steiguer, for appellants.

Scott Calhoun and *James E. Bradford*, for respondent.

PER CURIAM.—Upon the authority of the case of *Barrett v. Seattle*, *ante* p. 47, 97 Pac. 1109, the judgment of the superior court in this cause is reversed.

[No. 7779. Decided May 19, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Lee A. Johnson et al.*, *Plaintiff*, v. C. W. CLAUSEN, *State Auditor*, *Respondent*.[2]

Application filed in the supreme court, December 11, 1908, for a writ of mandamus directing the state auditor to issue warrants. Granted.

M. A. Folsom, *W. J. Thayer*, and *B. B. Adams*, for relators.

John D. Atkinson, *Attorney General*, and *W. V. Tanner*, and *William W. Manier*, *Assistants*, for respondent.

ON REHEARING.

PER CURIAM.—A petition for a rehearing has been filed in this case, in which it is claimed that the court disregarded the provisions of § 4 of art. 8, of the state constitution, in awarding its writ of mandate. The section cited reads as follows:

"No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years from the first day of May next after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum."

Inasmuch as the legislature of this state has made an appropriation in favor of the State College for the identical sum claimed, since the original opinion was filed (Laws 1909, p. 880, ch. 243), the constitutional provision relied upon is no longer involved, and further consideration of the question would be fruitless. The writ will therefore issue as prayed, leaving the question suggested by the petition for rehearing open for future consideration.

[1]Reported in 99 Pac. 1135.

[2]NOTE: For original opinion see *ante* p. 548. Not yet reported in Pacific Reporter. REP.

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21. APPEAL—RECORD—RULINGS ON PLEADINGS. The supreme court will not review error on a motion to make the complaint more definite and certain, where the record fails to show that the motion was acted upon. *Apker v. Hoquiam*..... 567

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23. SAME—STATEMENT OF FACTS—NECESSITY. In the absence of a bill of exceptions or statement of facts, the supreme court cannot review error in the admission of testimony, or the sufficiency of the evidence to justify the verdict. *Adams v. Columbia Canal Co*..... 297

24. APPEAL—RECORD—BILL OF EXCEPTIONS—NECESSITY. Where there are no findings of fact and no bill of exceptions or statement of facts, error in awarding a party relief outside of the issues requires a reversal of the judgment. *Loeper v. Loeper*..... 682

25. APPEAL—RECORD—STATEMENT OF FACTS—TIME FOR FILING—EXTENSION OF TIME—NOTICE. Under Bal. Code, § 4894, requiring notice to the adverse party of application to extend the time for filing a proposed statement of facts, a notice may be given in the forenoon of an application to be made at 3 o'clock in the afternoon, any reasonable notice being sufficient to confer jurisdiction; Bal. Code, § 4816a, which provides for three days' notice of motions and applications, not applying to proceedings after judgment. *Galler v. McMahon* 473

26. APPEAL — RECORD—STATEMENT OF FACTS—INSUFFICIENCY—SETTLEMENT—CORRECTION OF ERRORS—MANDAMUS. It is error for the trial court to strike out a proposed statement of facts because it is not deemed a proper statement, where it was filed in good faith in an

APPEAL AND ERROR—CONTINUED.
attempt to comply with the statute; since the remedy of the adverse party is to propose amendments, or to require that defects be supplied; and mandamus lies to compel the trial judge to proceed with the settlement. *State ex rel. Fowler v. Steiner*..... 239

27. APPEAL—RECORD—STATEMENT OF FACTS—NECESSITY OF CERTIFICATE. A statement of facts not certified by the trial judge, but simply authenticated by the affidavit of the stenographer who reported the case, will be struck out on motion. *Adams v. Columbia Canal Co.* 297

XI. BRIEFS.

28. APPEAL — BRIEFS — ASSIGNMENT OF ERRORS — SUFFICIENCY. While errors not pointed out with reasonable clearness will not be considered, a brief will not be struck for failure to assign errors, where the alleged errors are set forth with the pages of the record showing the various rulings, and rule eight is substantially complied with. *Spedden v. Sykes*..... 267

29. APPEAL—DISMISSAL—DILIGENCE—STATEMENT OF FACTS—BRIEFS—TIME FOR FILING—EXTENSION. An appeal will not be dismissed for failure to diligently prosecute it or promptly settle the statement of facts or file briefs, when the delay was caused by the prosecution of a mandamus proceeding, following which an order extending time was entered. *First National Bank v. Fowler*..... 638

30. APPEAL—BRIEFS—TIME FOR FILING—DISMISSAL. A motion to dismiss an appeal for failure to file briefs in time will be determined by the status of the case at the time the motion is heard. *Spedden v. Sykes* 267

XVI. REVIEW.

31. APPEAL—REVIEW—MOOT QUESTIONS. The supreme court will not decide abstract questions at the behest of parties having no interests at stake. *Hutchins v. Wertheimer*..... 539

32. APPEAL—REVIEW—EVIDENCE—EXCEPTIONS. In a trial before the court without a jury, an exception to the refusal to consider evidence, which was admitted "for what it was worth," is unavailing, as the evidence is before the supreme court for review. *Dietrich v. Pederson* 191

33. APPEAL—REVIEW—WAIVER OF NONSUIT. Where the refusal of a nonsuit is waived by the defendant's entering upon her case, the supreme court will review all of the evidence. *Dignam v. Shaff*. 412

34. APPEAL—REVIEW—WAIVER OF ERROR—NONSUIT. Error in denying a motion for a nonsuit, asked on the ground that the burden of proof had been upon the plaintiff respecting a certain defense, and as to which no evidence was given, is waived where the matter was afterwards fully gone into by the defense. *Schon v. Modern Woodmen of America* 482

APPEAL AND ERROR—CONTINUED.

35. APPEAL—REVIEW—PLEADINGS—AMENDMENTS. Where findings are not excepted to, the supreme court will treat the complaint as amended to conform to the proofs. *Kumblad v. Allen*..... 425

36. APPEAL—REVIEW—DISCRETION—CONTINUANCE. The refusal of a continuance will be reviewed only for abuse of discretion. *Warehime v. Schweitzer*..... 299

37. APPEAL—REVIEW—NEW TRIAL—DISCRETION. The refusal of a new trial will not be disturbed on appeal where there was no abuse of discretion. *Jones v. Seattle*..... 245

38. APPEAL—REVIEW—VERDICTS. The verdict of a jury will not be set aside because against the preponderance of conflicting evidence. *National Bank of Commerce v. Gougar*..... 204

39. APPEAL—REVIEW—VERDICTS. A verdict will not be disturbed on appeal although supported only by evidence largely of a negative character. *Schon v. Modern Woodmen of America*..... 482

40. APPEAL—REVIEW—VERDICT. The verdict of a jury upon a question of attorney's fees will not be disturbed if sustained by competent evidence. *Thorp v. Ramsey*..... 530

41. APPEAL—REVIEW—VERDICT. The supreme court will not set aside a verdict because of conflict in evidence supporting it. *McKay v. Anderson Steamboat Co*..... 679

42. SAME. Findings in an action at law made by a judge who saw the witnesses will not be disturbed when the supreme court is not convinced that they are against the weight of the evidence. *Dietrich v. Pederson* 191

43. APPEAL—REVIEW—FINDINGS. In an action at law tried by the court without a jury, findings upon conflicting evidence will not be disturbed on appeal where the trial court heard the witnesses and viewed the premises and there appears no preponderance of the evidence against the findings. *Judson v. Tide Water Lumber Co*... 164

44. APPEAL—REVIEW—ERROR AS TO ONE JOINT TORT FEASOR. In an action against a city and its contractor for personal injuries sustained upon a temporary sidewalk, error in directing a verdict in favor of the contractor is not ground for the reversal of a judgment against the city. *Jones v. Seattle*..... 245

45. APPEAL—REVIEW—ERROR FAVORABLE TO APPELLANT—NEW TRIAL—VERDICT—REMISSION OF EXCESS. Where, in an action on *quantum meruit* for services performed, no exception was taken to an instruction that the plaintiff was entitled to recover the whole sum demanded, if anything at all, the defendant cannot allege error in that the court inconsistently required the plaintiff to remit a part of the verdict, as that was favorable to the defendant. *Kenway v. Hoffman* 105

APPEAL AND ERROR—CONTINUED.

46. APPEAL—REVIEW — HARMLESS ERROR — FAVORABLE TO APPELLANT. The giving of an erroneous instruction at the request of and favorable to the appellant, and one that conflicts with other correct instructions, does not constitute reversible error of which the appellant can complain. *Benson v. Tacoma R. & Power Co*..... 216

47. APPEAL—REVIEW—HARMLESS ERROR. Error in rulings relating to the pleadings is not prejudicial where the case was finally submitted on an agreed statement of facts. *State v. Jensen*..... 59

48. APPEAL—REVIEW—HARMLESS ERROR—RULING ON PLEADINGS. Error in overruling a demurrer to an answer will be regarded as harmless, where no findings were made and the evidence is not brought up, and the trial court may have found the allegations of the complaint untrue. *Adams v. Columbia Canal Co*..... 297

49. APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS. Error in overruling a demurrer to a reply to an affirmative defense is harmless where no proof was offered to support the defense. *Ferrandini v. Bankers Life Association*..... 442

50. APPEAL—REVIEW—HARMLESS ERROR—WAIVER OF DEMURRER. Error cannot be assigned upon sustaining a demurrer to an answer, where defendant amended the answer setting up the same defense and introduced evidence in support of the same. *Richardson v. Cooper* 507

51. APPEAL—REVIEW—HARMLESS ERROR—TRIAL OF CAUSE. Under Bal. Code, § 6535, requiring the supreme court to disregard all technicalities and determine the cause on its merits, error cannot be assigned on setting a cause for trial before the issues are made up, where the parties had full opportunity to present the merits. *Ferrandini v. Bankers Life Association*..... 442

52. APPEAL—REVIEW—HARMLESS ERROR. In an action for injuries sustained by a servant while performing an act alleged and testified by him to be his duty to perform, it is not reversible error to admit evidence of whose duty it was before plaintiff went to work there. *Cook v. Pittock & Leadbetter Lumber Co*..... 316

53. APPEAL—REVIEW—HARMLESS ERROR. Error in admitting evidence in a case triable *de novo* on appeal is harmless. *Smith v. Scott*. 330

54. APPEAL—REVIEW — HARMLESS ERROR — FACTS OTHERWISE ESTABLISHED. It is harmless error to exclude a physician's certificate of death, stating the cause of death, where the physician testified fully as to the matters contained in the certificate. *Schon v. Modern Woodmen of America*..... 482

55. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Striking out evidence that a new walk had been laid since an accident on a defective walk, and instructing the jury to disregard it cures error in its admission. *Billings v. Snohomish*..... 135

56. APPEAL—REVIEW—EVIDENCE—STRIKING. Error cannot be assigned on the admission of evidence that was stricken out under instructions to the jury to disregard the same. *Jones v. Seattle*..... 245

APPEAL AND ERROR—CONTINUED.

57. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—SALES — MEASURE OF DAMAGES. In an action for damages for failure to deliver ties sold to the plaintiffs, the admission of evidence of the expense of a journey taken to secure a settlement is not prejudicial error, where, by the instructions to the jury, the damages were restricted to the difference between the market and contract price, and towage expenses. *McCormick v. Tappendorf*..... 312

58. APPEAL—REVIEW—HARMLESS ERROR—IRRELEVANT TESTIMONY. In an action for personal injuries to a traveler by team, through a defect in a street, it is error without prejudice that evidence was admitted of injuries received by the other occupants of the carriage, where the court cautioned the jury that it was admitted as a part of what occurred at the time and must not be considered in connection with plaintiff's injuries. *Apker v. Hoquiam*..... 567

59. APPEAL — REVIEW — HARMLESS ERROR — TRIAL — INSTRUCTIONS — STATEMENTS OF COUNSEL. It is not prejudicial error for the court to instruct that the jury are not to consider statements of counsel as evidence "unless it corresponds with your memory of the evidence as you heard the witness detail it," where the jury had been instructed that the case must be decided upon the testimony detailed upon the witness stand, and could not have been misled. *Thomas v. Fos* 250

60. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It is harmless error to give a technically incorrect instruction exonerating the appellant if it had established contributory negligence, where appellant had offered no evidence of contributory negligence, and there was none. *McKay v. Anderson Steamboat Co*..... 679

61. APPEAL—DECISION—LAW OF CASE. A decision on a former appeal as to the sufficiency of facts stated by counsel in his opening statement is the law of the case, and conclusive on review of evidence showing the same facts. *Akin v. Bradley Engineering & Machinery Co.* 658

62. APPEAL—REVIEW—LAW OF CASE. The opinion of the supreme court on a former appeal is the law of the case. *Sullivan v. Seattle Electric Co.* 71

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

63. APPEAL—DECISION—DAMAGES FOR DELAY. In affirming a judgment, damages for delay will not be awarded where the appeal was prosecuted in apparent good faith, although there was little merit in the appeal. *Ferrandini v. Bankers Life Association*..... 442

APPEARANCE:

Service of notice of appeal on party not appearing in lower court, see APPEAL AND ERROR, 19.

As waiver of notice of filing transcript, see MUNICIPAL CORPORATIONS, 8.

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT.

APPLICATION:

Statements in application as defense to action on policy, see INSURANCE, 3.

APPOINTMENT:

Of guardian for minor plaintiff, see DEATH, 2.
Of receiver pending foreclosure, see MORTGAGES, 5, 6.

APPORTIONMENT:

Of funds of school district, see SCHOOLS AND SCHOOL DISTRICTS.

ARGUMENT OF COUNSEL:

In civil actions, see TRIAL, 3, 6.

ARTICLES:

Of foreign corporation, duplication of corporate name, see CORPORATIONS, 8-10.

ASSESSMENT:

Of expenses of public improvements, see DRAINS.
For public improvements, see MUNICIPAL CORPORATIONS, 1-10.

ASSESSMENT WORK:

See MINES AND MINERALS, 4.

ASSETS:

Assignment as fraud on creditors, see CORPORATIONS, 5, 6.

ASSIGNMENT:

For benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Of assets of corporation as fraud on creditors, see CORPORATIONS, 5, 6.
Of lease, see LANDLORD AND TENANT, 1.
Garnishment of assigned claims of nonresident before delivery as conferring jurisdiction, see PROCESS.
Right of assignee of option to purchase land, see VENDOR AND PURCHASER, 8, 9.

ASSIGNMENT OF ERRORS:

In civil actions, see APPEAL AND ERROR, 28.

ASSIGNMENTS FOR BENEFIT OF CREDITORS:

By insolvent corporations, see CORPORATIONS, 5, 6.

1. ASSIGNMENT FOR CREDITORS — DELIVERY — ACCEPTANCE—GARNISHMENT OF CLAIMS BEFORE DELIVERY. There is not a complete assignment by an insolvent corporation of certain claims to one of its creditors, in part satisfaction of indebtedness, where it was made upon the express understanding that the assignee should give credit

ASSIGNMENTS FOR BENEFIT OF CREDITORS—CONTINUED.
for all sums actually collected under the assignment, and the assignment was not delivered or made known to or accepted by the assignee until after the claims had been garnished, and where after the assignment part of the claims were paid directly to the assignor with the knowledge and consent of the assignee. *Nixon v. Hendy Machine Works* 419

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 4, 5, 7, 10, 20-23.

ATTACHMENT:

Property exempt from attachment and protection of rights of exemption, see EXEMPTIONS.
In action to enforce lien for damage by vessel, see SHIPPING.

ATTORNEY AND CLIENT:

Inclusion of claim for attorney's fees in jurisdictional amount on appeal, see APPEAL AND ERROR, 3.
Evidence of value of services by attorney, see DAMAGES, 1.
Attorney's fees in action for future maintenance of child, see DIVORCE, 6.
Action in firm name by partnership, see PARTNERSHIP.
Bill of particulars in action by attorney for services, see PLEADING, 8.
Argument or conduct of counsel at trial in civil actions, see TRIAL, 3, 6.
Privileged communications, see WITNESSES, 3.

1. ATTORNEY AND CLIENT—RELATION—SUBSTITUTION — INSTRUCTIONS. A positive instruction that an attorney's employment is personal and cannot be delegated without the client's consent, and that a client would not be liable for the services of one member of a firm if neither that member or the firm were employed by him, is not nullified by a subsequent instruction that the rule forbidding the delegation of authority has no application to the members of a copartnership. *Thorp v. Ramsey*..... 530
2. ATTORNEY AND CLIENT—SERVICES—VALUE—EVIDENCE—COMPETENCY. In an action to recover the reasonable value of services of an attorney in a trial, the files and records in the cause are competent, whether they were sole attorneys in the cause or not. *Thorp v. Ramsey* 530
3. SAME. In an action by a firm of attorneys to recover for their services, which were intermingled, it is not error to exclude cross-examination of a plaintiff as to the reasonable value of his individual services. *Thorp v. Ramsey*..... 530

AUTHORITY:

Of attorney, see ATTORNEY AND CLIENT.
Of broker, see BROKERS, 1.
Of agent, see PRINCIPAL AND AGENT.

BAILMENT:

Carriage of goods, see CARRIERS, 1-6.

1. BAILMENT—LOSS OF MONEY—PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF. In an action to recover money deposited for safe keeping, the law presumes negligence if the money is lost, whether the bailment was gratuitous or not, and the burden of proof is therefore upon the defendant. *Pregent v. Mills*..... 187

2. SAME—EVIDENCE—CROSS-EXAMINATION. In an action to recover money deposited in a saloon safe for safe keeping, it is not error to permit cross-examination of the defendant as to his whereabouts on different occasions prior to the bailment. *Pregent v. Mills*..... 187

3. SAME—PLEADING—CONVERSION. An allegation of the deposit of money for safe keeping and a failure to return it, in effect alleges a conversion; rendering admissible evidence of the defendant's visits to the race track and betting on the races. *Pregent v. Mills*... 187

4. SAME—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for the recovery of money deposited in a saloon safe for safe keeping, which was lost, the reasonableness of the explanation of the defendant as to why he could not return the money is for the jury, although there was no contradictory evidence; also, the question of the bailee's care, in leaving the safe under a half lock, in charge of a barkeeper. *Pregent v. Mills*..... 187

BAR:

Of claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 2.

Of action by former adjudication, see JUDGMENT, 6-9.

Tender as bar to counterclaim, see SET-OFF AND COUNTERCLAIM.

BARRIERS:

Sufficiency to guard excavation in street, see MUNICIPAL CORPORATIONS, 13.

BELIEF:

Allegations or denials on information and belief, see PLEADING, 2.

BENEFICIAL ASSOCIATIONS:

Mutual benefit insurance association, see INSURANCE.

BENEFITS:

Assessment of preliminary expenses to lands not benefited, see DRAINS.

Assessment of benefits caused by construction of public improvements, see MUNICIPAL CORPORATIONS, 1-10.

BEQUESTS:

In general, see WILLS.

BETTING:

See GAMING.

BILL OF PARTICULARS:

In pleading in civil action, see PLEADING, 8, 9.

BILLS AND NOTES:

Parol evidence as affecting indorsement of negotiable instrument, see EVIDENCE, 5.

Acknowledgment or promise to pay debt sufficient to remove bar of statute, see LIMITATION OF ACTIONS, 6.

Renewal notes as estoppel to assert statute of limitations, see MORTGAGES, 4.

Issues and proof in action on bond, see PLEADING, 11.

BONDS:

On appeal, see APPEAL AND ERROR, 18.

Issues raised by general denial in action on bond, see PLEADING, 10.

For release of vessel in action to enforce lien for damages to bridge, see SHIPPING.

1. BONDS—TO ASSURE TITLE—DEFENSES—FAILURE OF TITLE—VENDOR AND PURCHASER. It is no defense to an action upon a bond, given to assure against defects in the title to land purchased by the plaintiffs, and to secure the cost of improvements to be made, that the plaintiffs knew of the defects in the title when the improvements were made by the plaintiffs, where the defects were not incurable. *Kumblad v. Allen* 425

2. SAME—DAMAGES—OFFSET OF RENTS AND PROFITS. In an action upon a bond given to assure the title to lands purchased by the plaintiffs and to secure the costs of improvements made, it is no defense that the plaintiffs had been in possession for years before ouster and had received sufficient rents and profits to offset their damages; since the true owner, and not the obligors in the bond, were entitled to recover the rents and profits. *Kumblad v. Allen* 425

BOOMS:

Obstructing navigable river, see NAVIGABLE WATERS, 4, 7, 8.

BOUNDARIES:

Marking boundaries of vein or lode locations, see MINES AND MINERALS.

1. BOUNDARIES—ADVERSE POSSESSION — MISTAKEN BOUNDARY LINE—EVIDENCE—SUFFICIENCY. Where, at the time of a sale of lots, the grantor marked the line upon the ground, open, notorious and exclusive possession by the grantee with reference to such line, upon which he built a substantial fence, claiming the same as the true dividing line, for more than ten years, confers title by adverse possession to the line, which included a three-foot strip of the adjoining lot. *Weingarten v. Shurtleff* 602

BREACH:

Of contract for carriage of goods, see CARRIERS, 2.
Of conditions, see DEEDS, 5.
Of contract of sale, see SALES.
Of warranty as ground for rescission of contract, see SALES, 1, 2.
Of contract for sale of land, see VENDOR AND PURCHASER.
Mitigation of damages for breach of contract of employment, see WORK AND LABOR.

BRIDGES:

Enforcement of lien for damages to bridge by vessel, see SHIPPING.

BRIEFS:

On appeal or writ of error, see APPEAL AND ERROR, 28-30.

BROKERS:

Parol evidence to show contract of sale as option, see EVIDENCE, 7.
Agency in general, see PRINCIPAL AND AGENT.

1. BROKERS—FRAUDS, STATUTE OF—CONTRACT TO SELL LANDS—AUTHORITY OF AGENT. A letter to real estate agents, who had represented the owner of property in the payment of taxes without authority to contract for sale, to the effect that the owner would be willing to sell certain lots at a certain price, does not authorize the agents to make a binding contract of sale which can be specifically enforced. *Hutchins v. Wertheimer*..... 539

2. SAME—RATIFICATION OF SALE BY AGENT. Ratification of an unauthorized sale of lots for $6,500 exclusive of commission to the agents, is not shown by the owner's acceptance with the distinct understanding that the price was $6,500 net, she to pay no back taxes or other expenses, the property being subject to back taxes. *Hutchins v. Wertheimer*..... 539

3. BROKERS—ACTION FOR COMMISSIONS—PLEADINGS—ISSUES AND PROOF—GENERAL DENIAL. In an action to recover a broker's commissions on an alleged contract of sale, the defendant may, under a general denial, offer evidence to show that the contract actually made was one other than that pleaded in the complaint. *Brown v. Wisner* 509

BUILDINGS:

Liens for labor and materials in construction of, see MECHANICS' LIENS.
Conversion by vendee under contract to purchase land, see TROVER AND CONVERSION.

BURDEN OF PROOF:

To overcome presumption of negligence of bailee, see BAILMENT, 1.
Shifting burden of proof by admissions of answer, see PLEADING, 3.

BURGLARY:

New trial for newly discovered evidence, see CRIMINAL LAW, 5.

1. BURGLARY—NATURE OF OFFENSE—BREAKING. The gist of burglary is the breaking and entering with intent to commit a crime. *State v. Beeman* 557

2. BURGLARY—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a conviction of burglary, where it appears that the house was broken open, and a feather bed stolen; that the property was found in the possession of the defendant, the feathers removed from the tick, the tick concealed, and that the defendant was seen in the vicinity of the house about the time of the burglary and tracks evidently made by his cart led to and from the house, although possession of the stolen property would not alone be *prima facie* proof of the burglary. *State v. Beeman*..... 557

3. SAME—EVIDENCE. The mere possession of stolen property is not *prima facie* evidence of the breaking and entering, but a circumstance to be considered by the jury. *State v. Beeman*..... 557

CANCELLATION OF INSTRUMENTS:

Rescission of contracts, see SALES.

Rescission of contract of sale of land, see VENDOR AND PURCHASER, 1-6.

1. CANCELLATION OF INSTRUMENTS—GROUNDS—FRAUD—WILFUL VIOLATION OF AGREEMENT FOR SUPPORT — EQUITY — PLEADING — RELIEF GRANTED. Where a daughter-in-law and son advanced the money to enable the son's parents to make improvements and complete the purchase of lots, which were deeded to the daughter-in-law under an agreement that the same were to belong to her after the death of the old people, who were to be allowed to live thereon during the remainder of their lives, but who were subsequently evicted by the daughter-in-law, equity will, upon the ground of presumed fraud in the first instance, decree a rescission of the contract upon repayment of the advances and interest, where the old people sought such relief in an action to declare the deed a mortgage and to redeem therefrom, although there was no proof of the allegation that the deed was intended as a mortgage; wilful violation of such an agreement being sufficient ground for cancellation of the deed. *Gustin v. Crockett* 67

CANDIDATES:

Disqualification by advertisement in newspapers, see ELECTIONS.

CARRIERS:

Contract for forwarding and delivery of goods, see CONTRACTS, 2.

1. CARRIERS OF GOODS—DELIVERY—CHARGES — COLLECTION — PREPAYMENT—INSTRUCTIONS. In an action for conversion of goods it is proper to instruct that a "forwarder and distributer" of goods, which contracts to make delivery at a certain place without prepayment

CARRIERS—CONTINUED.

of charges, cannot collect its charges until the goods are delivered at their destination, it being immaterial by what name the defendant designates the nature of its business. *Lee v. Fidelity Storage and Transfer Co.* 208

2. CARRIERS OF GOODS—CONTRACTS—CONSTRUCTION—BREACH—LIABILITY OF FORWARDER OR DISTRIBUTER OF GOODS. Where a foreign corporation contracts to forward and deliver goods for a specific sum, it is liable for failure to deliver in the manner agreed upon and for damage to the goods, regardless of whether it acted as a mere forwarder, or as a forwarder and distributer. *Garberson v. Trans-Continental Freight Co.* 213

3. SAME—ACTION FOR NONDELIVERY—CONDITIONS PRECEDENT. A demand for goods to be delivered by the defendant at T. under a contract to pay charges on delivery, is not a condition precedent to an action for a conversion, where, before suit, the defendant's agent refused to forward the goods until prepayment of the charges, as the demand is thereby waived. *Lee v. Fidelity Storage and Transfer Co.* 208

4. SAME—VALUE OF GOODS—EVIDENCE—SUFFICIENCY—PRESUMPTIONS. In an action for the conversion of goods delivered to the defendant at St. Paul to be forwarded to Tacoma, plaintiff's evidence of the value at St. Paul is sufficient evidence of the value at the time of their conversion, where the goods had not been used and were in possession of the defendant, and the defendant refused to show their real value at that time; as the presumption would arise that their value had not been reduced. *Lee v. Fidelity Storage and Transfer Co.* 208

5. SAME—EVIDENCE OF CONTRACT—REMOTENESS. In an action for damages to goods, and for recovery of an excess charge, under a contract whereby defendant, a forwarder and distributer of goods, agreed to ship the goods from Ohio and deliver them at Seattle for a specified sum, evidence as to the railroad rates on similar goods is inadmissible to show the probabilities as to what the contract in fact was; the same being too remote and speculative, in view of the competition in such rates. *Garberson v. Trans-Continental Freight Co.* 213

6. CARRIERS—OF GOODS—CONNECTING CARRIERS—PRESUMPTIONS—DISTINCT SHIPMENTS. The presumption that goods shipped by connecting carriers were received by the last carrier in the same condition as when delivered for shipment to the initial carrier does not apply where there were two distinct transactions or shipments; and where a ticket was purchased over one road from St. Louis to Kansas City and a trunk checked to that point, without any indication that the journey would be continued, a railroad company checking the trunk upon a ticket subsequently purchased from Kansas City to Seattle is

CARRIERS—CONTINUED.
not liable for loss of contents of the trunk, which had been opened and rifled, where there was no evidence as to the condition of the trunk and contents at the time it was checked upon the last ticket. *Sheble v. Oregon R. & Nav. Co.* 359

7. CARRIERS—PASSENGERS—INTOXICATION—DEGREE OF CARE—NOTICE OF CONDITION. It is error to instruct the jury to the effect that a street car company is bound to exercise reasonable care to ascertain the condition of a passenger as to sobriety, and to take precautions for his safety accordingly; as the carrier has a right to assume that he was sober until the contrary appears. *Sullivan v. Seattle Electric Co.* 71

8. CARRIERS—DEGREE OF CARE—PASSENGERS UNDER DISABILITY. A street car company that knowingly accepts for transportation an intoxicated passenger, is bound to exercise such special care and assistance as his condition requires in order that he may be safely transported. *Benson v. Tacoma R. & Power Co.* 216

9. CARRIERS — NEGLIGENCE — LANDING PASSENGERS — SHIPPING — EVIDENCE OF CUSTOM. Evidence of custom in landing passengers at a wharf is properly excluded where there was simply a dispute as to the facts on the issue as to negligence, the testimony of either party, if true, warranting a favorable verdict. *McKay v. Anderson Steamboat Co.* 679

10. CARRIERS—NEGLIGENCE—SETTING DOWN PASSENGERS — EVIDENCE — ADMISSIBILITY. In an action for causing the death of an intoxicated passenger by permitting him to alight at a dangerous place, evidence offered by plaintiffs tending to show that the deceased was prevented by the carrier in his attempt to alight at a place where the streets were safe, is inadmissible. *Sullivan v. Seattle Electric Co.* 71

11. SAME—EVIDENCE—OPINIONS. In an action for causing the death of an intoxicated passenger in permitting him to alight at a dangerous place, evidence that bystanders exclaimed that "it was murder" to allow him to get off there is inadmissible, as the same is only an expression of opinion. *Sullivan v. Seattle Electric Co.* .. 71

12. SAME—EVIDENCE OF INTOXICATION. In such an action, evidence that the passenger was muddy and bloody about the face when he got on the car is admissible to show notice of his condition. *Sullivan v. Seattle Electric Co.* 71

13. SAME—EVIDENCE—QUESTION FOR JURY. Whether a street car company failed to exercise due care in allowing an intoxicated passenger to ride on the outside of the car, whence he fell to his death, is for the jury, where it was clearly shown that he was very intoxicated when he boarded the car or soon afterwards, and the conductor admitted knowledge of his intoxication, and by way of impeachment, it was shown that the conductor had stated that he was "drunk as h——l, and kept getting drunker." *Benson v. Tacoma R. & Power Co.* 216

CARRIERS—CONTINUED.

14. CARRIER—NEGLIGENCE—LANDING PASSENGERS—EVIDENCE—QUESTION FOR JURY. Negligence in landing a passenger from a steamer is for the jury, where there was testimony to the effect that the boat tied up at the wharf and starting up shifted away while plaintiff was attempting and before she had an opportunity to alight, precipitating her into the water. *McKay v. Anderson Steamboat Co.*..... 679

CERTAINTY:

Effect of ordering bill of particulars on motion to make complaint definite and certain, see PLEADING, 9.

CERTIFICATE:

To statement of facts or bill exceptions, see APPEAL AND ERROR, 27.
Of nomination by political party, see ELECTIONS.
As proof of death, see INSURANCE, 1.

CHARACTER:

Previous chaste character as question for jury, see SEDUCTION, 3.

CHARGE:

Duty to deliver goods before collection of charges, see CARRIERS, 1.
To jury in civil actions, see TRIAL, 9-16.

CHATTEL MORTGAGES:

1. CHATTEL MORTGAGES—FILING—NOTICE. The filing of a chattel mortgage upon a traction engine with the county auditor and the indexing thereof, as required by Laws 1899, p. 157, § 2, is expressly made sufficient notice to all the world by § 3 of said act, and puts upon notice a subsequent lienor, without recording the same as in the case of real estate mortgages. *Averill Machinery Co. v. Allbritton* 30

CHILD:

Contributory negligence on part of children, see NEGLIGENCE.

CIRCULATION:

Newspaper of general circulation, see NEWSPAPERS.

CITIES:

See MUNICIPAL CORPORATIONS.
Judicial notice of population of, see EVIDENCE, 1.

CITIZENS:

Privileges and immunities, see CONSTITUTIONAL LAW, 4.

CLAIMS:

For agricultural liens, see AGRICULTURE.
Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2, 4.
For exemption, see EXEMPTIONS.
Mining claims, see MINES AND MINERALS.
Against municipal corporation for injury in streets, notice of, see MUNICIPAL CORPORATIONS, 24-27.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW, 3, 4.

CLOUD ON TITLE:

See QUIETING TITLE.

COLLATERAL ATTACK:

On sale of decedent's property under order of court, see EXECUTORS AND ADMINISTRATORS, 7.
On judgment, see JUDGMENT, 6.

COLLECTION:

Duty of carrier to deliver goods before collection of charges, see CARRIERS, 1.

COLLEGES AND UNIVERSITIES:

1. COLLEGES AND UNIVERSITIES—NATURE. The state college of Washington is a state institution. *State ex rel. Johnson v. Clausen*.. 548

COLLISION:

Admiralty jurisdiction to enforce remedy for maritime torts, see ADMIRALTY.

COLOR OF TITLE:

Possession and notice on abandoned ground as color of title, see MINES AND MINERALS, 2, 3.

COMITY:

As affecting right of foreign corporation to file articles, see CORPORATIONS, 8.

COMMENT:

By judge in instructions, see INSURANCE, 4.
By judge on evidence in instructions, see MASTER AND SERVANT, 24.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

1. COMMERCE—MONOPOLIES—RAILROADS—COMPETING PARALLEL LINES—AGREEMENT TO BUILD NEW ROAD—RESTRAINT OF TRADE. The constitutional and statutory prohibitions against the consolidation of parallel and competing transportation lines are not violated by an arrangement between two railroad companies operating competing

COMMERCE—CONTINUED.
lines between Spokane and Seattle, Washington, whereby each subscribed for one-half of the capital stock of a new and distinct railroad corporation and contributed one-half of the cost of constructing a new railroad from Spokane to Portland, Oregon, opening up and serving new territory, each road continuing its individual identity and control. *State ex rel. Cascade R. Co. v. Superior Court*.... 346

COMMISSIONS:
Of broker, see BROKERS, 3.

COMMON CARRIERS:
See CARRIERS.

COMMON SCHOOLS:
See SCHOOLS AND SCHOOL DISTRICTS.

COMMUNITY PROPERTY:
Property rights after divorce, see DIVORCE, 7.
Administration of estate, see EXECUTORS AND ADMINISTRATORS, 1.
In general, see HUSBAND AND WIFE.
Settlement by husband and wife on government land, see PUBLIC LANDS, 4.

COMPENSATION:
Of attorney, see ATTORNEY AND CLIENT.
Of broker, see BROKERS.
For delivery of goods, duty to deliver at destination, see CARRIERS, 1.
Of corporate officer or agent, see CORPORATIONS, 1, 2.
Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.
For use of money, see INTEREST.

COMPETENCY:
Of experts as witnesses, see EVIDENCE, 8, 9.
Of fellow employees, see MASTER AND SERVANT, 2, 16.
Of witnesses in general, see WITNESSES, 2, 3.

COMPLAINT:
Statement of cause of action, see PLEADING.

COMPROMISE AND SETTLEMENT:
Admissibility of offers to compromise, see EVIDENCE, 2.

CONCLUSIVENESS:
Of judgments, see JUDGMENT, 6-9.

CONDEMNATION:
Taking property for public use, see EMINENT DOMAIN.

CONDITIONS:

Precedent to action for conversion of goods, see CARRIERS, 3.
Presumption as to condition of goods in possession of connecting carrier, see CARRIERS, 6.
On granting continuance, see CONTINUANCE.
Precedent to action by corporation, see CORPORATIONS, 4.
In deeds, see DEEDS, 5.
Conditional delivery of deed, see ESCROWS.
Precedent to action against city, reasonableness of requirements, see MUNICIPAL CORPORATIONS, 24-26.
As affecting tender, see TENDER, 2.
Effect of failure of grantee to perform condition subsequent, see VENDOR AND PURCHASER, 2, 3.
Precedent to rescission of contract for sale of land, see VENDOR AND PURCHASER, 6.

CONDUCT OF COUNSEL:

Of counsel in civil actions, see TRIAL, 3, 6.

CONFIDENTIAL RELATIONS:

Disclosure of communications, see WITNESSES, 3.

CONFIRMATION:

Of assessment for public improvements, appeal from, see MUNICIPAL CORPORATIONS, 7, 8.

CONNECTING CARRIERS:

See CARRIERS, 6.

CONSOLIDATION:

Notice and bond on appeal from consolidated actions, see APPEAL AND ERROR, 18.

CONSTITUTIONAL LAW:

Limitation of action by state or county against person holding school lands by adverse possession, see ADVERSE POSSESSION, 1.
Provision for publication of notice to creditors by executor of non-intervention will as affecting vested rights, see EXECUTORS AND ADMINISTRATORS, 3.
Apportionment of school funds, see SCHOOLS AND SCHOOL DISTRICTS.
Subjects and titles of statutes, see STATUTES.

1. CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS—STATUTE—TIME OF TAKING EFFECT—DETERMINATION OF FACT—ANIMALS—ALLOWING TO RUN AT LARGE. Laws 1907, p. 566, making it a misdemeanor to permit live stock to run at large in counties where three-fourths of the land is under fence, does not unlawfully delegate legislative powers in providing that ten freeholders and the board of county commissioners shall determine the fact as to three-fourths of the land being under fence, and that notice thereof be given; as a statute may provide for its taking effect upon the happening of a future event. *State v. Storey*..... 630

CONSTITUTIONAL LAW—CONTINUED.

2. SAME—CONFERRING JUDICIAL POWERS. Such a law is not unconstitutional as conferring judicial powers on the county commissioners and assessors, their acts being ministerial rather than judicial, and especially as the conferring of judicial powers on them is not obnoxious to the constitution. *State v. Storey*..... 630

3. SAME—CLASS LEGISLATION—POLICE REGULATIONS. Such an act is not discriminatory, as it applies to the whole state, and being a police regulation, may be made to apply to certain locations. *State v. Storey* 630

4. CONSTITUTIONAL LAW—CLASS LEGISLATION—POLICE POWER—ORDINANCES—FALSE REPRESENTATIONS BY EMPLOYMENT AGENCIES. In an ordinance to regulate and license employment agencies, a section making it a misdemeanor for the keeper of an employment agency to make wilful misrepresentations, or to wilfully deceive any person seeking employment, and take a fee for such employment, is unconstitutional; since it is not general and impartial in its operation, but operates upon one class to the exclusion of others in respect to a penal act common to all classes of business, and exceeds the reasonable limit of police regulations. *Spokane v. Macho*..... 322

CONSTRUCTION:

Of contract to forward and deliver goods, see CARRIERS, 2.
Of contracts, see CONTRACTS, 1.
Of act preventing duplication of corporate names, see CORPORATIONS, 9.
As to deposit of deed and intent of grantor, see DEEDS, 1, 2.
Of deed as to reservations and estates granted, see DEEDS, 4.
Statute disqualifying candidate for statement published in newspaper, see ELECTIONS.
Statute authorizing right of eminent domain to water company, see EMINENT DOMAIN, 1.
Statute relating to costs on foreclosure of logger's lien, see LOGS AND LOGGING.
Of provisions of mortgage for renewal notes, see MORTGAGES, 4.
Of party wall agreement, see PARTY WALLS.
Of statute prohibiting advertising by doctor without license, see PHYSICIANS AND SURGEONS.
Statute prohibiting unlawful occupancy of public domain, see PUBLIC LANDS, 2.
Of act relating to management of state finances, see STATES.
Statute requiring written instructions on request, see TRIAL, 10-11.

CONSTRUCTIVE NOTICE:

To city of defect causing injury, see MUNICIPAL CORPORATIONS, 11, 12.

CONTINUANCE:

Review of discretionary action, see APPEAL AND ERROR, 36.
Payment of witness fees as condition on granting continuance, see JUDGMENT, 2.

1. CONTINUANCE—CONDITIONS—PAYMENT OF COSTS. It is not an abuse of discretion to require the payment of costs, including the mileage of plaintiff's witnesses, as a condition for the granting of a continuance, asked for on the opening of the trial on behalf of the defendant who was unable to be present because in jail, where such defendant had had fifteen days notice of the day of trial. *Warehime v. Schweitzer* 299

CONTRACTORS:

Opinions as to cost of building, see EVIDENCE, 9.

CONTRACTS:

Review of questions as dependent on objection in lower court, see APPEAL AND ERROR, 8.
Bailment, see BAILMENT.
Authority to execute binding contract of sale, see BROKERS, 1.
Cancellation, see CANCELLATION OF INSTRUMENTS.
Transportation of goods, see CARRIERS, 1-6.
Agreement to build railroad as violation of law prohibiting consolidation of parallel lines, see COMMERCE.
Subscription to corporate stock, see CORPORATIONS, 1.
As to officers of corporation, see CORPORATIONS, 3.
For sale of land as affecting title to crops, see CROPS.
Parol evidence to vary, see EVIDENCE, 4-7.
Of Indians, see INDIANS, 2.
Constituting relation of independent contractor, see MASTER AND SERVANT, 1.
As giving right to mechanics' lien, see MECHANICS' LIENS, 1.
Party-wall agreements, see PARTY WALLS.
Authority of agent to make contracts, see PRINCIPAL AND AGENT.
Proceedings in land office, see PUBLIC LANDS, 5, 6.
Sales of personalty, see SALES.
Claims arising out of contract as subject to set-off, see SET-OFF AND COUNTERCLAIM.
Specific performance, see SPECIFIC PERFORMANCE.
Sale of land, see VENDOR AND PURCHASER.
Rescission of sale of land, see VENDOR AND PURCHASER, 1-6.
Damages for breach of contract of employment, see WORK AND LABOR.

1. CONTRACTS—CONSTRUCTION—FOR SINKING WELL—TEST OF CAPACITY—PERFORMANCE. In a contract for sinking city wells, agreed to produce 1,500,000 gallons per day for a period of fourteen months, a clause providing that, after a certain payment upon obtaining a supply of 800,000 gallons a day, the contractor shall be paid the bal-

CONTRACTS—CONTINUED.
ance when successful in obtaining a supply equal to 1,500,000 gallons per day of twenty-four hours, "when tests are made and work accepted by the city council," requires that the character of the well for the entire period must be ascertained by test, and upon a successful test made by authority of the council for six days, the contractor is entitled to the full contract price before the expiration of the fourteen months. *Green v. Ballard*..... 149

2. CONTRACTS—EXISTENCE—BREACH—EVIDENCE—QUESTION FOR JURY. The existence of a contract to forward goods from St. Paul to Tacoma, and its breach, is for the jury, where the plaintiff's evidence was to the effect that there was a clean-cut contract for delivery at Tacoma without prepayment, and the defendant's agent refused to forward the goods from Seattle to Tacoma without full prepayment of the charges. *Lee v. Fidelity Storage and Transfer Co*..... 208

CONTRIBUTION:

For support of child after divorce, see DIVORCE, 2, 5.

CONTRIBUTORY NEGLIGENCE:

Of servant, see MASTER AND SERVANT, 20-23.
Of traveler on city street, see MUNICIPAL CORPORATIONS, 23.
Of child in exploding dynamite cap, see NEGLIGENCE.

CONVERSION:

Wrongful conversion of personal property, see TROVER AND CONVERSION.

CONVEYANCES:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Of personalty as security for debt, see CHATTEL MORTGAGES.
In general, see DEEDS.
In escrow, see ESCROWS.
Deeds by Indians, see INDIANS, 2.
As security for debt, see MORTGAGES.
Authority of agent, see PRINCIPAL AND AGENT.
In trust, see TRUSTS.

CORONERS:

Records of inquest as evidence of death, see DEATH, 1.

CORPORATIONS:

Review of rulings as dependent on exceptions in lower court, see APPEAL AND ERROR, 12.
Assignment of claims for benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Delegation of power of eminent domain to private corporations, see EMINENT DOMAIN.
Municipalities, see MUNICIPAL CORPORATIONS.
School districts, see SCHOOLS AND SCHOOL DISTRICTS.

CORPORATIONS—CONTINUED.

1. CORPORATIONS—STOCK—SUBSCRIPTIONS—CONTRACT FOR PURCHASE—DEFINITENESS—SPECIFIC PERFORMANCE. A contract whereby a purchaser of corporate stock was to have the "option to come into the mill and take part in its management on the same terms" as provided for certain other stockholders, is too indefinite to warrant a specific performance conferring upon him the right to any particular office in the corporation, or to draw the same salary that the other officers were to be paid. *Hampton v. Buchanan*..... 155

2. CORPORATIONS—ACTIONS AGAINST—SALARY OF OFFICERS. In an action brought against a corporation and its officers for a salary and a wrongful discharge from employment, resulting from collusion, any judgment for the plaintiff should be against the corporation, and cannot be made a lien against the property of a colluding officer who was joined as defendant in the suit. *Hampton v. Buchanan* 155

3. SAME — STOCKHOLDERS — CONTRACTS AS TO OFFICERS—LEGALITY—SPECIFIC PERFORMANCE. A promoters' contract between stockholders of a corporation placing upon the trustees the duty to elect certain officers at similar salaries is illegal and will not be specifically enforced. *Hampton v. Buchanan*..... 155

4. CORPORATIONS—ACTIONS—CAPACITY TO SUE—CONDITIONS PRECEDENT—PAYMENT OF LICENSE FEE—WAIVER OF OBJECTIONS. Laws 1907, p. 271, § 7, providing that no corporation shall be permitted to commence or maintain an action without alleging and proving that it had paid its annual license fee last due, relates only to the plaintiff's capacity to sue, and under Bal. Code, §§ 4907, 4909, if objection is not taken by demurrer or answer, the same is waived and the action cannot be dismissed for failure to prove payment of the fee. *Rothchild Bros. v. Mahoney*..... 633

5. CORPORATIONS—INSOLVENCY—ASSETS—FRAUD UPON CREDITORS. A corporation that is not able to pay its debts in due course of business is insolvent, so far as creditors are concerned, and cannot prefer a creditor. *Nixon v. Hendy Machine Works*..... 419

6. SAME—ASSIGNMENT IN FRAUD OF CREDITORS. Where two corporations were controlled by the same stockholders and officers, and one was used as a shield for the benefit of the other, they are not independent concerns, and an assignment of assets by one to the other is fraud upon creditors of the assignor. *Nixon v. Hendy Machine Works* 419

7. CORPORATIONS—STOCKHOLDERS—FRAUD UPON MINORITY STOCKHOLDERS—RECEIVERS. Equity will grant relief to a minority stockholder in a corporation by the appointment of a receiver where there was collusion between the officers to unfairly deal with the plaintiff by dismissing him from office and absorbing the profits of the business in large increased salaries to themselves. *Hampton v. Buchanan* 155

CORPORATIONS—CONTINUED.

8. CORPORATIONS—FOREIGN—RIGHT TO DO BUSINESS — COMITY. No principal of comity is involved in the right of a foreign corporation to file articles of incorporation in this state pursuant to the laws of this state; since comity is a rule of expediency based upon the law or decisions of other states, rather than our own. *State ex rel. Baker River and Shuiksan R. Co. v. Nichols*..... 619

9. SAME—FILING ARTICLES—DUPLICATION OF NAMES—STATUTES—CONSTRUCTION. Laws 1903 entitled an act to prevent the duplication of corporate entitlements, which provides that "no corporation shall take the name of another heretofore organized under the laws of this state nor of any foreign corporation having complied with the laws of this state," applies alike to domestic and foreign corporations, although the first paragraph relates only to domestic corporations; and articles of a foreign corporation cannot be filed if the name is the same as that of any domestic corporation; especially in view of Const., art. 12, § 7, providing that no foreign corporation shall be permitted to do business within the state on more favorable conditions than are prescribed for similar domestic corporations. *State ex rel. Baker River and Shuiksan R. Co. v. Nichols*..... 619

10. SAME—MANDAMUS. Mandamus will not issue to compel the secretary of state to file improper articles of incorporation, duplicating corporate names, and leave the aggrieved party to its remedy in equity; since the courts will not require the doing of a vain or illegal act, and the public is concerned in maintaining a distinction between corporate names. *State ex rel. Baker River and Shuiksan R. Co. v. Nichols*..... 619

11. CORPORATIONS—FOREIGN—ACTIONS—PROCESS—SERVICE ON AGENT — DOING BUSINESS WITHIN STATE. A foreign corporation engaged in the business of assembling car load lots of household and other goods and forwarding them to, and distributing or storing them in, this state, through an agent located at S. in this state, which receives, distributes, or stores the goods here, is "doing business within this state," within the meaning of Bal. Code, § 4875, authorizing the service of summons upon "any agent." *Lee v. Fidelity Storage and Transfer Co.* 208

CORRECTION:

Of record on appeal or writ of error, see APPEAL AND ERROR, 26.
Of judgment, see JUDGMENT, 3, 5.

COSERVANT:

Employment of incompetent servant, see MASTER AND SERVANT, 2, 16.

COSTS:

As condition of granting continuance, see CONTINUANCE.
In divorce, see DIVORCE, 6.
Preliminary costs in proceedings to organize drainage district, see DRAINS.

COSTS—CONTINUED.

Opinion of contractor as to cost of building, see EVIDENCE, 9.
On enforcement of lien on logs, see LOGS AND LOGGING.

1. COSTS—WHEN DISCRETIONARY. Upon dismissing a complaint, and quieting defendant's title on a cross-complaint, costs to defendant are discretionary. *Loeper v. Loeper*..... 682

2. COSTS—ON APPEAL. In litigation between divorced parties in the interest of a child and to provide for its support, the court may direct that no costs be allowed on appeal. *Hector v. Hector*... 434

COUNSEL:

See ATTORNEY AND CLIENT.

COUNTERCLAIM:

See SET-OFF AND COUNTERCLAIM.

COUNTIES:

Delegation of legislative and judicial powers to county officers, see CONSTITUTIONAL LAW, 1, 2.
Establishment of drains, see DRAINS.
Establishment of highway over public land, see HIGHWAYS.
Establishment of highway over land in possession of entryman, see PUBLIC LANDS, 3.

COURTS:

Admiralty jurisdiction, see ADMIRALTY.
Review of decisions, see APPEAL AND ERROR, 1-4.
Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 61, 62.
Judicial power, see CONSTITUTIONAL LAW.
Appointment of receiver in action by minority stockholders, see CORPORATIONS, 7.
Judicial notice, see EVIDENCE, 1.
Administration proceedings, see EXECUTORS AND ADMINISTRATORS.
Jurisdiction in action by Indian to recover possession of lands held under patent subject to restrictions, see INDIANS, 3, 4.
Correction or review of orders in same court, see JUDGMENT, 3, 5.
Conclusiveness of judgments, see JUDGMENT, 6-9.
Jurisdiction of nonresident by publication of summons and garnishment of assigned claims, see PROCESS.
Restraining prosecution for seduction after stay of proceedings by marriage, see PROHIBITION.
Enforcement of lien for damage to bridge by vessel, see SHIPPING.
Province of court and jury, see TRIAL, 7, 8.

1. COURTS—JURISDICTION—PRESUMPTIONS—JUDGMENTS. Upon a collateral attack of a proceeding in a court of general jurisdiction, jurisdiction will be presumed unless the contrary appears of record. *Magee v. Big Bend Land Co*..... 406

COVENANTS:

Party-wall agreement as creating covenant running with land, see PARTY WALLS.

In contract for sale of land, see VENDOR AND PURCHASER, 1-3.

CREDITORS:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Publication of notice to creditors by executor of nonintervention will, see EXECUTORS AND ADMINISTRATORS, 2-4.

CRIMINAL LAW:

See BURGLARY; FALSE PRETENSES; GAMING; HOMICIDE; SEDUCTION.

Practicing medicine without license, see PHYSICIANS AND SURGEONS.

Restraining prosecution for criminal offense, see PROHIBITION.

1. CRIMINAL LAW—EVIDENCE—EXHIBITS—SAMPLES OF HANDWRITING—GENUINENESS—COMPETENCY. Where the accused denied the writing of a note tacked upon the cabin of the deceased the morning after he was last seen alive, samples of the accused's handwriting, identified by competent evidence of their genuineness, are admissible in evidence as exhibits for comparison by experts, although the accused did not himself admit their genuineness on the stand. *State v. Fillpot* 223

2. CRIMINAL LAW—EVIDENCE—SANITY—OPINIONS OF EXPERT. In a prosecution for homicide, committed by defendant after he had been drinking intoxicating liquor, opinions of a physician testifying as an expert, as to the probable effect thereof upon his mind, are admissible upon an issue as to defendant's sanity. *State v. Bridgham*. 18

3. SAME—EVIDENCE—OF VENUE—SUFFICIENCY. Where there was circumstantial evidence sufficient to justify the jury in finding that the deceased, who was last seen alive in Spokane county, had been killed in that county and his body thrown into a river forming the boundary line and had floated down and lodged on the other side of the river, in Stevens county, the fact that the body was found in Stevens county would not show want of jurisdiction in the superior court of Spokane county, or that the crime had been committed in Stevens county. *State v. Fillpot* 223

4. SAME—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—ABUSE OF DISCRETION. It is an abuse of discretion and error to deny a new trial, asked on the ground of newly discovered evidence, after conviction of statutory rape upon a female under the age of consent, where the conviction rested almost entirely upon the evidence of the prosecutrix, and she subsequently made affidavit, and testified in court on the hearing of the motion for new trial, that her testimony was false and that defendant had never had sexual intercourse with her, explaining that she was coerced to give false testimony. *State v. Powell* 372

CRIMINAL LAW—CONTINUED.

5. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE. The general rule that a new trial will not be granted, for newly discovered evidence to impeach a witness, applies in a prosecution for burglary where the newly discovered evidence merely tended to contradict the owner's identification of the property, and the owner did not assume to positively identify it, identification having been made by another witness. *State v. Beeman*..... 557

6. SAME—NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence is properly denied where the same is merely cumulative. *State v. Bridgham*..... 18

7. SAME. A new trial will not be granted in a criminal case to secure the evidence of a witness now a resident in the East, when it is only shown that counsel believe he will be present at the new trial; nor when his evidence would be only cumulative. *State v. Beeman* 557

8. SAME. Error cannot be assigned upon instructions that were not properly excepted to. *State v. Fillpot*..... 223

9. CRIMINAL LAW—APPEAL—EXCEPTIONS. Error cannot be assigned on failing to grant a motion to view premises in a prosecution for a homicide, when the court delayed ruling "until later in the case," no exception was then taken, and the motion was not renewed, nor anything further done except the noting of an exception after the jury was instructed and had retired. *State v. Fillpot*..... 223

CROPS:

1. CROPS—OWNERSHIP—POSSESSION. The occupier of land is the owner of all crops harvested during his term of occupancy. *Lynch v. Sprague Roller Mills*..... 535

2. CROPS—VENDOR AND PURCHASER—CONTRACTS — TITLE TO CROPS—CONSTRUCTION. A contract for the sale of land, providing that the principal and interest to become due on the purchase price shall be paid out of the proceeds of the sale of wheat to be raised by the vendees, and that the parties should mutually agree upon the warehouse in which the wheat was to be stored and the time when it was to be sold, does not vest in the vendors any right or title in or to the wheat, the rule of construction for contracts between landlord and tenant applying. *Lynch v. Sprague Roller Mills*..... 535

CROSS-EXAMINATION:

Of member of firm to show value of individual services, see ATTORNEY AND CLIENT, 3.

Of bailee in action to recover money deposited for safe keeping, see BAILMENT, 2.

Relevancy of evidence in action of replevin, see REPLEVIN.

CUMULATIVE EVIDENCE:

Newly discovered evidence as ground for new trial, see CRIMINAL LAW, 6.

CUSTODY:

Support and custody of children, see DIVORCE, 2-5.

CUSTOMS AND USAGES:

Of custom in landing passengers from boat, see CARRIERS, 9.

DAILY PAPERS:

What constitutes paper of general circulation, see NEWSPAPERS.

DAMAGES:

Remission of part of verdict as error favorable to appellant, see APPEAL AND ERROR, 45.
For delay on affirmance of appeal, see APPEAL AND ERROR, 63.
Offset of rents and profits in action on bond to assure title, see BONDS.
For delay in transportation of goods, see CARRIERS, 2.
Competency of mortality tables, see EVIDENCE, 3.
Unlawful detainer, see LANDLORD AND TENANT, 4.
Injuries from public improvements, see MUNICIPAL CORPORATIONS, 1-7.
Injuries from obstructions in navigable waters, see NAVIGABLE WATERS, 2, 4-8.
Injuries by vessel to pier of bridge, see SHIPPING.
For trespass, see TRESPASS.
Right of action for breach of covenant, see VENDOR AND PURCHASER, 3.
Amount recoverable for services, see WORK AND LABOR.

1. DAMAGES—ATTORNEY'S FEES—VALUE—EVIDENCE—SUFFICIENCY. In an action for damages including a sum paid for attorney's services, that the attorney had defended a former action for the plaintiff, and that plaintiff had paid him $100 for such services, is sufficient evidence of the value of the services to warrant the submission thereof to the jury. *Curtley v. Security Savings Society*..... 242

2. DAMAGES—INSTRUCTIONS—PREVIOUS DISABILITY — EARNING CAPACITY. An instruction to consider the difference in the earning capacity of the plaintiff before and after the accident, for loss of fingers, covers consideration of the fact that he had already lost the tips of his fingers in a previous accident. *Duskey v. Green Lake Shingle Co.* 145

3. DAMAGES — PERSONAL INJURIES — EXCESSIVE VERDICT. A verdict for $3,500 for a slight abrasion of the knees, sustained in tripping on a defective sidewalk, the same healing at once and causing no subsequent trouble, unless neurasthenia resulted from the shock, for which condition there were other more probable causes, is excessive, and should be reduced to $2,000. *Billings v. Snohomish*. 135

4. DAMAGES—INJURIES—EXCESSIVE VERDICT. A verdict for $2,080, for the loss of the tips of four fingers of the left hand of a man 28 years of age, impairing his earning capacity to the extent of one dollar a day, is not excessive. *Duskey v. Green Lake Shingle Co.* 145

DAMAGES—CONTINUED.

5. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $7,500 for personal injuries is not excessive where the plaintiff was a stevedore, twenty-eight years old, having an average earning capacity of $1,200 per year, and his knee cap and elbow joint were fractured, bones had to be removed, and he lost the use of his arm, so that his earning capacity at manual labor was practically destroyed. *Pearson v. Alaska-Pacific Steamship Co*..... 560

DANGEROUS MACHINERY AND APPLIANCES:

See MASTER AND SERVANT.

DEATH:

Evidence in action for death of intoxicated passenger, see CARRIERS, 10-12.

Dying declarations in prosecutions for homicide, see HOMICIDE, 4-6.

Proof of death in action on insurance policy, see INSURANCE, 1.

Laws in force at testator's death as governing will, see WILLS.

1. DEATH—CAUSE OF DEATH — EVIDENCE — RECORDS — CORONER'S INQUEST. The record of a coroner's report of an inquest is not competent evidence in civil actions of the cause of the death. *Sullivan v. Seattle Electric Co*..... 71

2. DEATH—ACTION—DISMISSAL AND NONSUIT — PARTIES — INFANTS—APPOINTMENT OF GUARDIAN. In an action for wrongful death, the fact that the guardian of minor plaintiffs was not properly appointed, would not be ground for a nonsuit, where the complaint stated a cause of action in favor of the widow. *Anustasakas v. International Contract Co*..... 119

3. SAME—ACTIONS—PERSONS ENTITLED TO MAINTAIN—ALIENS. Nonresident aliens may maintain an action for wrongful death under our statutes authorizing an action for the benefit of the widow and children. *Anustasakas v. International Contract Co*..... 119

DEBTOR AND CREDITOR:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Nonresidence of debtor as affecting suspension of statute, see LIMITATION OF ACTIONS, 3.

Community debts and property liable therefor, see HUSBAND AND WIFE, 5, 6.

DECEDENTS:

Testimony as to transactions with persons since deceased, see WITNESSES, 2.

DECISION:

On appeal, see APPEAL AND ERROR, 61, 62.

As rule of property, see HUSBAND AND WIFE, 3, 4.

Former decisions as controlling, see JUDGMENT, 6-9.

DECLARATIONS:

Dying declarations, see HOMICIDE, 4-6.

DEEDS:

Cancellation, see CANCELLATION OF INSTRUMENTS.
In escrow, see ESCROWS.
From husband to wife of community property, see HUSBAND AND WIFE, 5.
By Indian holding under patent with restrictions against alienation, see INDIANS, 2.
In trust, see TRUSTS.

1. DEEDS — DELIVERY — UPON DEATH OF GRANTOR — CONSTRUCTION — GIFTS—INTENT—EVIDENCE—SUFFICIENCY. There is a valid delivery of a deed where it is deposited with a bank to be held during the grantor's lifetime and delivered after death to the grantee, where it further appears that a clause in the deed so provided and appointed the bank the grantor's "agent" to make such delivery with the same force and effect as if delivered by the grantor during his lifetime, and it appears by extrinsic evidence that the grantor was seriously ill and under obligations to the grantee and desired to make the grantee a gift of the land, reserving only the rents and profits during his life, and after the delivery to the bank he had no control or dominion over the deed. *Maxwell v. Harper*..... 351

2. SAME—EVIDENCE—AMBIGUITY IN DEED. A deed delivered to a third party to be held during the lifetime of the grantor and delivered after death to the grantee, which so provides and appoints such third party the "agent" of the grantor to make such delivery, is so ambiguous as to admit of extrinsic evidence to show the intent of the grantor. *Maxwell v. Harper*..... 351

3. SAME—ESTATES CONVEYED—DETERMINABLE FEE. A deed conveying a determinable fee may embrace a fee upon condition, entitling the tenant, for the time being, to all the rights of a fee simple. *Aumiller v. Dash* 520

4. DEEDS—ESTATE GRANTED—RESERVATIONS—CONSTRUCTION. A deed granting the undivided one-half of a strip of land one rod wide, so long as the grantees shall use the same as a private way and for an irrigation ditch, and further granting the right to use the other undivided one-half of the strip for the same purposes, reserving the right in the grantors to make common use of the strip for all purposes connected with the adjoining land, conveys a determinable fee simple title to an undivided one-half of the strip, and precludes the grantors, during the life of the grantee's estate, from dedicating the strip to the public as a public highway. *Aumiller v. Dash*..... 520

5. DEEDS—CONDITIONS—BREACH. Conditions subsequent in a deed do not affect the estate until they are broken. *Aumiller v. Dash* 520

DEFAULT:

Necessity of notice of appeal on party in default, see APPEAL AND ERROR, 19.

In payments under contract of sale, see VENDOR AND PURCHASER, 4-9.

DEFENSES:

In action on bond given to assure title to land purchased, see BONDS.

Deceased's statements in application as defense in action on policy, see INSURANCE, 8.

In action for obstructing navigable river, see NAVIGABLE WATERS, 3, 4.

Necessity for anticipating, see PLEADING, 4.

In action for price of land, see VENDOR AND PURCHASER, 10.

Vendee's inability to pay cash as defense to action for nondelivery, see SALES, 3.

DELAY:

Laches, see EQUITY.

DELEGATION:

Of legislative powers, see CONSTITUTIONAL LAW, 1.

DELIBERATION:

Sufficiency of evidence of, see HOMICIDE, 7.

DELIVERY:

Of claims assigned for benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Of goods by carrier, see CARRIERS, 1-3.

Of deed, see DEEDS, 1, 2.

Of deed in escrow, see ESCROWS.

Vendee's inability to pay cash as defense to action for nondelivery, see SALES, 3.

DEMAND:

As condition precedent to action for conversion of goods, see CARRIERS, 3.

For payment before suit as affecting right to costs, see LOGS AND LOGGING.

DEMURRER:

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 48-50.

To pleading, see PLEADING, 7.

DENIALS:

In pleading, see PLEADING, 2, 10.

DEPARTURE:

In pleading, see PLEADING, 4-6.

DEPOSITS:

Deposit of deed as sufficient delivery, see Deeds, 1, 2.
Deposit of money in bank as tender, see Tender.

DESCENT AND DISTRIBUTION:

Administration of estates of decedents, see Executors and Administrators.

DESCRIPTION:

Of property conveyed, see Boundaries.
Of defect causing injury in claim filed with city, see Municipal Corporations, 27.

DETERMINABLE FEE:

Conveyance of estate, see Deeds, 3, 4.

DEVISE:

See Wills.

DILIGENCE:

Affecting right to new trial, see New Trial, 2, 3.
Of party asking relief, see Specific Performance, 2.

DIRECTING VERDICT:

In civil actions, see Trial, 7.

DISCOVERY:

Of mineral, see Mines and Minerals, 3, 5.

1. Discovery — Interrogatories — Materiality — Striking Out — Waiver of Error. Defendant's right to demand interrogatories tending to a discovery of the fact that plaintiff was under age and incapacitated from suing, which were struck out because her complaint alleged that she was only nineteen, is waived if not renewed after amendment of the complaint to show that she was twenty-three. *Murrilla v. Guis*..... 93

2. Discovery—Subpoena Duces Tecum—Failure to Produce Papers—Presumption—Question for Jury. The failure of a party to produce evidence within his possession, in compliance with a subpoena *duces tecum*, raises the presumption that they are what the adverse party claims them to be; and it is proper to so instruct the jury, and to instruct that it is for the jury to determine whether he complied with the subpoena. *Thomas v. Fos*..... 250

DISCRETION OF COURT:

Review in civil actions, see Appeal and Error, 36, 37.
To grant continuance, see Continuance.
As to costs, see Costs.

DISCRETION OF COURT—CONTINUED.
Grant of new trial for newly discovered evidence, see CRIMINAL LAW, 4.
Opening or vacation of judgment, see JUDGMENT, 2-5.
New trial, see NEW TRIAL, 2.
Renewal of demurrer after answer, see PLEADING, 7.

DISCRIMINATION:
Special privileges or immunities and class legislation, see CONSTITUTIONAL LAW, 4.

DISMISSAL AND NONSUIT:
Dismissal on appeal or writ of error, see APPEAL AND ERROR, 29, 30.
Waiver of error in rulings on motion, see APPEAL AND ERROR, 33, 34.
Costs on dismissal or nonsuit, see COSTS.
Failure to properly appoint guardian for minor plaintiff as ground for dismissal, see DEATH, 2.
Vacation of voluntary dismissal as involving discretion of court, see JUDGMENT, 2.
Judgment of dismissal as *res adjudicata*, see JUDGMENT, 7.

DISTRICTS:
Drainage districts, see DRAINS.

DITCHES:
See DRAINS.

DIVORCE:
Review of rulings as dependent on presentation of objection in lower court, see APPEAL AND ERROR, 7.
Costs on appeal in action between divorced parties for support of child, see COSTS, 2.

1. DIVORCE—DECREE—DISPOSITION OF PROPERTY. Upon granting a divorce, the court properly disposes of their property rights with regard to their respective merits, their subsequent condition, the party through whom the property was acquired and the burdens imposed thereon for the benefit of the children; and it is immaterial that the husband some years previously had conveyed the same to the wife upon consideration of love and affection and an agreement to live with him, which consideration had failed. *Dodds v. Dodds* 293

2. DIVORCE—SUPPORT OF CHILDREN—AFTER DIVORCE — CONTRIBUTION. Bal. Code, § 4508, providing that expenses of the family and education of the children are chargeable upon the property of both husband and wife, raises a joint and several obligation therefor; and a divorced wife, who thereafter maintained a child awarded to her without provision for its support, is entitled only to contribution from the husband, and cannot recover from him the whole of the sums expended by her. *Hector v. Hector*..... 434

DIVORCE—CONTINUED.

3. DIVORCE—CUSTODY OF MINOR CHILD. The modification of a divorce decree respecting the custody of a child, whereby the same is awarded to the father during the school period of the year, and to the mother during vacation, will not be disturbed on appeal upon conflicting evidence, where neither parent appears to be an improper person to have such custody, and the order appears the most fitting that could be made. *Goerig v. Goerig*..... 333

4. DIVORCE—DECREE—SUPPORT OF CHILDREN. In the decree of divorce, provision should be made for the support of the children, to the end that there may be an end to the litigation. *Hector v. Hector*... 434

5. SAME—FUTURE ALLOWANCES—CONTRIBUTION TO SUPPORT—EQUALIZATION. In an action by a divorced wife for future allowances for the support of a child awarded to her by the decree without provision for support, the court does not possess the discretion exercised in granting a divorce, but both parties must contribute equally if able, and otherwise the burden must be equalized as nearly as may be. *Hector v. Hector*..... 434

6. SAME—COSTS—ATTORNEY'S FEES. In an action by a divorced wife to recover from the husband the expense of maintaining a child and for future allowances therefor, attorney's fees are not recoverable except such as are taxable as costs under general laws. *Hector v. Hector* 434

7. DIVORCE—PROPERTY RIGHTS AFTER DIVORCE—HUSBAND AND WIFE—SEPARATE AND COMMUNITY PROPERTY. Where a decree of divorce did not determine the rights of the parties in and to their real estate, the separate property of the husband becomes his individual property after divorce, and the community property becomes their joint property. *James v. James*..... 60

DOCTORS:

See PHYSICIANS AND SURGEONS.

DOCUMENTS:

Production and inspection of writings, see DISCOVERY.

DOMICILE:

As affecting separate or community interest in property, see HUSBAND AND WIFE, 2.

Nonresidence of judgment debtor as tolling statute, see LIMITATION OF ACTIONS, 3.

DRAINS:

Validity of statute as dependent on expression of subject in title, see STATUTES, I.

DRAINS—CONTINUED.

1. DRAINS—DRAINAGE DISTRICTS—PROCEEDINGS — PRELIMINARY COSTS —LIABILITY OF LAND—BENEFITS. Under Laws 1895, ch. 115, authorizing the organization of a drainage district where an improvement would be of special benefit to a majority of the lands included in the proposed boundaries, property included in the district which was found to be not benefited may be proportionally taxed with all the other land in the district to pay the preliminary expenses to ascertain whether the proposed improvement should be carried out, upon abandonment and dismissal of the proceedings for lack of sufficient benefit to cover the cost; the power to levy such tax being incident to the main power conferred, and is not affected by failure of the contemplated improvement. *Northern Pac. R. Co. v. Pierce County* 12

2. SAME—OBJECTIONS—WAIVER. A land owner who makes no objections to proceedings to establish a drainage district until after decree is made, is estopped to object to anything except the constitutionality of the law. *Northern Pac. R. Co. v. Pierce County*.. 12

3. SAME—TAXATION—POWER TO LEVY COSTS OF PROCEEDINGS. The power of the legislature to authorize the levy of a tax upon a drainage district to pay the preliminary expense of ascertaining whether the improvement shall be made, does not depend upon whether the district is a municipal corporation, and the tax cannot be objected to where the burden was voluntarily assumed by a vote of the people of the district. *Northern Pac. R. Co. v. Pierce County*..... 12

DUPLICATION:

Articles of incorporation duplicating corporate name, see CORPORATIONS, 8-10.

DUPLICITY:

Of information charging murder in first degree, see HOMICIDE, 1, 2.

DYING DECLARATIONS:

See HOMICIDE, 4-6.

EARNINGS:

Instruction as to damages for loss of earning capacity, see DAMAGES, 2.

EDUCATION:

See SCHOOLS AND SCHOOL DISTRICTS.

EJECTMENT:

Right of Indians to sue, see INDIANS, 3.

1. EJECTMENT—TITLE OF PLAINTIFF. The legal title through a patent from the government is sufficient to support ejectment. *Northern Pac. R. Co. v. George*..... 303

EJECTMENT—Continued.

2. Ejectment—Title. The plaintiff in ejectment must recover upon the strength of her own title rather than on the weakness of the defendants. *Delacey v. Commercial Trust Co*..... 542

3. Ejectment—Parties. Where a contest in the land department has been decided adversely to an entryman in possession, his wife is not a necessary party defendant to an action of ejectment. *Delacey v. Commercial Trust Co*..... 542

ELECTION:

To treat mortgage debt as due on default, see Mortgages, 3.

ELECTIONS:

Contracts as to election and salary of officers, see Corporations, 3.

1. Elections—Nominations—Primary Elections—Disqualification of Candidate—Advertising—Statutes—Construction. Laws 1907, p. 472, § 28, disqualifying any candidate for office who pays for "any article or published statement in a newspaper wherein the electors are advised or counseled to vote for such candidate, or his fitness or qualifications for office are set forth, or his photograph or biography is published" does not disqualify one who paid for the publication of his photograph, over a statement of his name and candidacy, and marked "Paid Advertisement"; in view of the severity of the penalty and of the obscurity in this and the next section, wherein it is made a misdemeanor for publishers of newspapers to publish for pay, articles advocating a candidacy, except when appearing and designated as a "Paid Advertisement"; and since the same is not an article or published statement wherein the electors are advised to vote for him or wherein his fitness is discussed. *State ex rel. Coon v. Hay*..... 576

2. Elections—Certifying Nominations—Mandamus—Reasonableness of Time. A writ of mandate to compel the secretary of state to certify certain nominations to the county auditors, applied for less than one week prior to the election and when the tickets had already been certified and most of them printed, will be denied when no reason is given why the nominations were not filed and tendered within the time required by law, the time not being reasonable. *State ex rel. Socialist Labor Party v. Nichols*..... 79

EMINENT DOMAIN:

Public improvements by municipalities, see Municipal Corporations, 1-6.

Assessment to pay compensation for property taken for public use, see Municipal Corporations, 1-10.

Necessity of condemning interest of settler on public land sought for highway, see Public Lands, 3.

EMINENT DOMAIN—CONTINUED.

1. EMINENT DOMAIN—PARTIES ENTITLED—WATER COMPANIES—STATUTES—CONSTRUCTION. A water company having a municipal franchise to supply water to a city and its inhabitants, is, under our constitutional and statutory provisions, authorized to exercise the right of eminent domain to acquire the necessary lands and waters, where the owner thereof refuses to supply the city with water upon request so to do; and the general statutes subjecting such corporations to control and regulation are sufficient in that respect without any statute fixing the rates which shall be charged for such supply. *State ex rel. Shropshire v. Superior Court*..... 386

2. SAME—PRIVATE USES. The supplying of water by a water company to mills and factories for the purpose of generating power is a private use. *State ex rel. Shropshire v. Superior Court*..... 386

3. SAME. The fact that one of the declared purposes of a water company was to furnish water to mills and factories for the private purposes of generating power, does not preclude it from condemning the waters of a stream, where there is evidence of the necessity thereof to supply water to the city for municipal purposes and its inhabitants for ordinary domestic uses. *State ex rel. Shropshire v. Superior Court* 386

4. EMINENT DOMAIN—PARTIES ENTITLED—SUBSCRIPTION OF STOCK—VALIDITY—TRUSTEE FOR OTHER RAILROADS. A subscription to the capital stock of a railroad corporation by a trustee in behalf of two other railroad companies, each of which was the owner of the beneficial interest in one-half of such stock, is sufficient to confer upon the new corporation the right of eminent domain, where the new company was to serve new territory. *State ex rel. Cascade R. Co. v. Superior Court* 346

EMPLOYEES:

See MASTER AND SERVANT.

EMPLOYMENT AGENCIES:

Regulation of as class legislation, see CONSTITUTIONAL LAW, 4.

ENTRYMAN:

Rights of entryman in possession, see PUBLIC LANDS, 3.

EQUITY:

See CANCELLATION OF INSTRUMENTS; SPECIFIC PERFORMANCE; TRUSTS.

Appointment of receiver in action by minority stockholder for fraud of corporation, see CORPORATIONS, 7.

Accrual of action for relief on ground of fraud, see LIMITATION OF ACTIONS, 4.

Power to order removal of obstruction in navigable river, see NAVIGABLE WATERS, 2.

Determination of adverse claim to real property, see QUIETING TITLE.

EQUITY—CONTINUED.

1. EQUITY — LACHES — TRUSTS IN REAL ESTATE — LAPSE OF TIME. Where a husband and wife conveyed premises on which they lived to a third party, under a verbal agreement that the grantee would redeem the same from a mortgage and hold the same in trust for his wife, and the husband afterwards left the state, secured a divorce from his wife, and made no claim to the property for twenty years, he is barred by laches from setting up the trust or asserting any interest in the land. *Spaulding v. Collins*..... 488

ESCROWS:

1. ESCROWS—DEEDS—GIFTS—RIGHTS OF GRANTEE—ACTS OF HOLDER. Where a deed was delivered to a third party to be held during the lifetime of the grantor and after death delivered to the grantee as a gift, the mistaken belief of such third party that the deed was subject to the dominion and control of the grantor does not affect the rights of the grantee. *Maxwell v. Harper*..... 351

2. SAME—WITHDRAWAL—INTENT OF GRANTOR. The intent to vest title in a grantee by delivery of a deed to a third party to be delivered to the grantee upon the death of the grantor, cannot be changed by the grantor by withdrawing the deed without the consent of the grantee. *Maxwell v. Harper*..... 351

3. SAME—SUBSEQUENT MORTGAGE BY DONOR. The fact that a grantor after deeding land as a gift by an unrecorded deed, mortgaged the same to an innocent mortgagee, does not affect the donee's title to the land, subject to the mortgage. *Maxwell v. Harper*..... 351

ESTABLISHMENT:

Of boundaries, see BOUNDARIES.
Of drains, see DRAINS.
Of highways, see HIGHWAYS.

ESTATES:

Created by deed, see DEEDS, 3, 4.
Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

Right to raise question for first time on appeal, see APPEAL AND ERROR, 6-10.
To object to proceedings to establish drainage district, see DRAINS, 2, 3.
By judgment, see JUDGMENT, 6-9.
Of mortgagor to set up defense of limitation of actions, see MORTGAGES, 4.
To assert invalidity of assessment for public improvements, see MUNICIPAL CORPORATIONS, 5, 6.

EVIDENCE:

Review of rulings as dependent on presentation of objection in lower court, see APPEAL AND ERROR, 5, 6.
Necessity for incorporating evidence in bill of exceptions, see APPEAL AND ERROR, 23.
Review of rulings as dependent on presentation by record, see APPEAL AND ERROR, 23.
Review on waiver of nonsuit, see APPEAL AND ERROR, 33.
Conclusiveness of findings or verdict on sufficient or conflicting evidence, see APPEAL AND ERROR, 38-43.
Prejudice from error on appeal, see APPEAL AND ERROR, 52-58.
Value of attorney's services, see ATTORNEY AND CLIENT, 2, 3.
In action to recover money deposited for safe keeping, see BAILMENT.
To establish boundaries, see BOUNDARIES.
In action for broker's compensation, see BROKERS, 3.
In prosecution for burglary, see BURGLARY.
In suit for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.
Of value of goods converted by carrier, see CARRIERS, 4.
Of contract in action for damages to goods by carrier, see CARRIERS, 5.
For injuries to passenger, see CARRIERS, 9-14.
Of contract and breach as question for jury, see CONTRACTS, 2.
In criminal prosecutions, see CRIMINAL LAW.
Of value of attorneys' services, see DAMAGES, 1.
Of cause of death, see DEATH, 1.
As to deeds, see DEEDS, 1, 2.
Discovery of evidence, see DISCOVERY.
Of fraud in sale by administrator, see EXECUTORS AND ADMINISTRATORS, 6.
Sufficiency to sustain conviction for obtaining money under false pretenses, see FALSE PRETENSES.
Dying declaration as evidence in criminal prosecution, see HOMICIDE, 4-6.
Sufficiency to show deliberation of accused, see HOMICIDE, 7.
Admissibility of physician's certificate as proof of death, see INSURANCE, 1.
Cause of death in action on life insurance policy, see INSURANCE, 2.
Employment of incompetent coservant, see MASTER AND SERVANT, 2, 16.
For injuries to servant in general, see MASTER AND SERVANT, 2, 9-11, 13-20, 22.
Of failure to do assessment work see MINES AND MINERALS, 4.
For injuries in streets, see MUNICIPAL CORPORATIONS, 11, 15-21.
Newly discovered evidence as ground for new trial, see NEW TRIAL.
In actions relating to party walls, see PARTY WALLS.
Admissibility of evidence under pleading, see PLEADING, 10, 11.
In replevin, see REPLEVIN.
In civil action for seduction, see SEDUCTION.

EVIDENCE—CONTINUED.

Sufficiency of tender as question for jury, see TENDER, 3.
In action for trespass in cutting timber, see TRESPASS.
Objections to evidence at trial, see TRIAL, 1, 2.
Questions of fact for jury, see TRIAL, 7, 8.
Applicability of instructions to evidence, see TRIAL, 13.
In action for conversion, see TROVER AND CONVERSION, 1.
To establish trust, see TRUSTS.
Competency, attendance, credibility and examination of witnesses, see WITNESSES.
Admissibility of evidence as to transactions with decedent, see WITNESSES, 2.

1. EVIDENCE—JUDICIAL NOTICE—POPULATION. The court will take judicial notice of the population of its cities as shown by a pamphlet issued under the auspices of the state, and of the approximate increase since the date of such issue. *Times Printing Co. v. Star Publishing Co.* 667

2. EVIDENCE—OFFER TO COMPROMISE—ADMISSIBILITY. In an action on an account stated, evidence of defendant's offer to compromise is properly struck out. *National Bank of Commerce v. Gougar*.. 204

3. EVIDENCE—MORTALITY TABLES—ADMISSIBILITY. Upon an issue as to permanent, although only partial, disability by reason of the loss of fingers, mortality tables are admissible. *Duskey v. Green Lake Shingle Co.* 145

4. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—ADMISSIBILITY—ACCOUNT STATED. In an action upon an account stated, which was to recover sums alleged to have been advanced and paid to defendant to be used by him in operating a certain mill, oral evidence on the part of defendant that the mill belonged to the plaintiff and was operated by him for the plaintiff and that the sums were paid for plaintiff's benefit and at its request under a verbal contract for defendant's remuneration, is not inadmissible as varying the terms of a written lease of the mill, claimed by the plaintiff to have been made to the defendant, where the existence of the lease was not an issue or mentioned in the pleadings, but merely a collateral matter disputed by the defendant, and incidentally raised at the trial to contradict the evidence of the verbal agreement. *National Bank of Commerce v. Gougar*..... 204

5. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—BILLS AND NOTES. In the absence of fraud or mistake, parol evidence is inadmissible to show that the maker of a note signed the same for a corporation under a collateral verbal agreement that he should not be liable thereon either as principal or surety. *Anderson v. Mitchell*.... 265

6. EVIDENCE—PAROL EVIDENCE AFFECTING WRITING—INDEPENDENT CONTRACTORS—MASTER AND SERVANT. In an action against the principal contractor on railroad construction work, for injuries sustained from a blast set off by a subcontractor, it is competent for the plain-

EVIDENCE—CONTINUED.

tiff to show by oral evidence that the relation between the contractors was that of master and servant and that defendant had actual control of the work, regardless of the terms of the written contract between them. *Kendall v. Johnson*..... 477

7. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—BROKERS—CONTRACT OR OPTION. In an action to recover a broker's commissions, oral evidence is admissible to show that a written contract of sale for $92,000 on which but $100 was paid was intended by the parties as an option only, since the rule excluding oral evidence to vary the terms of a writing does not apply except as between the parties to the contract. *Brown v. Wisner*..... 509

8. EVIDENCE—GUARDING MACHINERY—OPINION OF EXPERT. Upon an issue as to whether a saw was guarded under the factory act, an expert may give his opinion by testifying that simply looking at the saw would suggest the kind of a guard proposed by him. *Gustafson v. West Lumber Co.*..... 25

9. EVIDENCE—OPINIONS OF EXPERTS—HYPOTHETICAL QUESTIONS—SUFFICIENCY. Upon an issue as to the cost of a proposed building, the plans and specifications for which had been lost, it is competent, after showing in a general way the character, size, design and details of the house intended to be built, to ask expert contractors to state the probable cost of its construction, where the hypothetical questions included substantially all the details of construction and the adverse party had an opportunity to call attention to any detail omitted. *Curtley v. Security Savings Society*..... 242

EXAMINATION:

Of adverse party before trial, see DISCOVERY.
Of witnesses in general, see WITNESSES.

EXCAVATIONS:

Liability of city for injuries by excavations in streets, see MUNICIPAL CORPORATIONS, 13.

EXCEPTIONS:

Necessity for exceptions for purposes of review, see APPEAL AND ERROR, 11-16, 22, 32.
Necessity of exceptions to reserve ground for review in criminal prosecution, see CRIMINAL LAW, 8, 9.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see APPEAL AND ERROR, 23, 24.

EXCESSIVE DAMAGES:

See DAMAGES, 3-5.
For obtruction of navigable river, see NAVIGABLE WATERS, 5, 6.
For trespass in cutting timber, see TRESPASS.

EXECUTION:

Parol evidence as to execution of note, see EVIDENCE, 5.

Exemptions from execution and protection of rights of exemption, see EXEMPTIONS.

EXECUTORS AND ADMINISTRATORS:

Collateral attack on judgment of probate court, see JUDGMENT, 6.

1. EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE—ADMINISTRATION OF COMMUNITY PROPERTY. In the administration upon the estate of a widower, without there having been any previous administration upon the estate of his deceased wife, the court has jurisdiction to administer the whole of their community property. *Magee v. Big Bend Land Co.* 406

2. EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION—LIMITATION OF ACTIONS. Claims against the executors of a nonintervention will are barred if not presented within the year limited by notice to creditors. *Strand v. Stewart*..... 685

3. SAME—CONSTITUTIONAL LAW—PROCEDURE—VESTED RIGHTS. Laws 1897, p. 285, providing for the publication of notice to creditors by executors of a nonintervention will applies to wills executed prior to the passage of the act, as it relates to a mere matter of procedure; and the same does not affect vested rights where the testator died after the act went into effect. *Strand v. Stewart*..... 685

4. EXECUTORS AND ADMINISTRATORS—CLAIMS—NOTICE TO CREDITORS—SOLVENCY OF ESTATE—NONINTERVENTION WILLS. An adjudication of solvency of an estate, in the case of a nonintervention will, need not precede the publication of notice to creditors, which, by Bal. Code, § 6226, is required immediately upon appointment. *Strand v. Stewart* 685

5. EXECUTORS AND ADMINISTRATORS—SALE OF REAL ESTATE—JURISDICTION—PETITION. A petition for an administrator's sale of real estate to pay debts sufficiently shows jurisdiction to make the sale, where it appears that the personal property, consisting of stock, was lost without fault of the administrator, the money having been expended in an effort to save the stock, that no personal property remains in his hands, and that there is no way to pay the debts except by sale of the real estate. *Magee v. Big Bend Land Co.* 406

6. EXECUTORS AND ADMINISTRATORS—SALE TO PAY DEBTS—FRAUD—HUSBAND AND WIFE—COMMUNITY PROPERTY—PURCHASE BY WIFE OF ADMINISTRATOR—FRAUDULENT CONVEYANCES—EVIDENCE—SUFFICIENCY. There is no evidence of fraud warranting the setting aside of an administrator's sale to his wife of lands of the estate to pay a mortgage, alleged to have been purchased by the wife with community funds of herself and husband, where it appears that part of the estate was covered by a mortgage for $1,575, that the mortgage was purchased by the administrator's wife, one of the heirs, with money given to her by her husband for that purpose, and that she bid in

EXECUTORS AND ADMINISTRATORS—CONTINUED.

the mortgaged property and also the balance of the estate on a deficiency judgment; it appearing that she paid more than the mortgage was worth, the face of which exceeded the value of the entire property; and the fact that the land afterward became valuable, and was deeded by the wife to satisfy a subsequent debt of the husband would not establish fraud or that the same was not her separate property. *Hipkins v. Estes* 1

7. EXECUTORS AND ADMINISTRATORS—SALE—COURTS—JURISDICTION—COLLATERAL ATTACK—JUDGMENTS. The territorial probate court being a court of record, having a seal, with exclusive original jurisdiction over probate proceedings, its judgments therein need not affirmatively show the existence of facts upon which the exercise of jurisdiction depends, but the same are presumed unless the contrary appears; hence an administrator's sale of real estate and confirmation thereof by such court cannot be collaterally attacked for failure to appoint a guardian *ad litem* and give notice to a minor, such defects not appearing on the record. *Magee v. Big Bend Land Co.* 406

EXEMPTIONS:

1. EXEMPTIONS—WAIVER—TIME FOR CLAIMING—GARNISHMENT. A claim of a personal property exemption from moneys garnished to satisfy a judgment must be made within a reasonable time, in the absence of statutory limitation, and is waived where the debtor had notice of the issuance of the execution and garnishment and made no answer to the garnishment, nor any claim to the exemption until after trial in the garnishment proceedings and announcement of the judgment against the garnishee; since Bal. Code, § 5410, makes it the duty of the defendant to controvert the answer of the garnishee by setting up his every claim or demand, and a full disclosure is the burden upon him who claims as exempt, property levied upon or attached. *United States Fidelity & Guaranty Co. v. Hollenshead* 326

EXHIBITS:

Handwriting of accused as evidence, see CRIMINAL LAW, 1.

EXPERTS:

Admissibility of expert testimony in general, see EVIDENCE, 8, 9.
Opinions as to negligence of servant, see MASTER AND SERVANT, 17.

EXPERT TESTIMONY:

In criminal prosecutions, see CRIMINAL LAW.
In civil actions, see EVIDENCE, 8, 9.

EXPLOSIVES:

Negligence in deposit of dynamite caps so as to attract children, see NEGLIGENCE.

EXPRESS TRUSTS:

See TRUSTS.

EXTENSION:

Notice to extend time for filing proposed statement of facts, see APPEAL AND ERROR, 25.

FACTORY ACT:

Guarding dangerous machinery, see MASTER AND SERVANT, 15, 21.

FAILURE OF PROOF:

In action to recover money loaned, see PLEADING, 12.

FALSE PRETENSES:

1. FALSE PRETENSES—EVIDENCE—SUFFICIENCY—IDENTITY—MISREPRESENTING NAME—MATERIALITY. The evidence is insufficient to sustain a conviction for obtaining money under false pretenses, by means of falsely representing that the accused was the owner and indorser of a check indorsed by J. H. H. when in truth that was not his name and neither the indorsement nor the check were his, where it appears that he had assumed the name of J. H. H. and the check was his property and he had a right to indorse the same in such name, the only false statement being the misrepresentation as to his name; since that was immaterial, and any representations implied from presentation that the check was signed by the drawer, and was the property of accused and indorsed by him, were all true. *State v. Bingham* 616

FALSE REPRESENTATIONS:

By employment agency as misdemeanor, class legislation, see CONSTITUTIONAL LAW, 4.

As ground for rescission of sale of personalty, see SALES, 1, 2.

FEE SIMPLE:

Creation by deed, see DEEDS, 3.

FELLOW SERVANTS:

See MASTER AND SERVANT, 3.

FILING:

Of proposed case or statement of facts on appeal, see APPEAL AND ERROR, 25.

Chattel mortgage, see CHATTEL MORTGAGES.

Articles of incorporation, duplication of corporate name, see CORPORATIONS, 8-10.

Of loggers' lien in action to foreclose, see LOGS AND LOGGING.

FINDINGS:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 12, 13, 15, 16.

Review on appeal or writ of error, see APPEAL AND ERROR, 42, 43.

FORECLOSURE:

Of logger's lien, see LOGS AND LOGGING.
Of mechanics' lien, see MECHANICS' LIENS.
Of mortgage, see MORTGAGES, 4, 5.
Of tax lien, see TAXATION, 4-6.

FOREIGN CORPORATIONS:

See CORPORATIONS, 8-11.

FORFEITURE:

Of contract or payments thereunder for sale of land, see VENDOR AND PURCHASER.

FORMER ADJUDICATION:

See JUDGMENT, 6-9.

FOUNDATION:

For impeachment of witness, see WITNESSES, 4.

FRAUD:

See FALSE PRETENSES.
As ground for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.
Assignment of assets in fraud of creditors, see CORPORATIONS, 5, 6.
On minority stockholders, appointment of receiver, see CORPORATIONS, 7.
By administrator as ground to set aside sale of decedent's land, see EXECUTORS AND ADMINISTRATORS, 6.
Effect on limitation, see LIMITATION OF ACTIONS, 4.
In sale of personalty, see SALES, 1, 2.

FRAUDS, STATUTE OF:

Authority of broker to make binding contract of sale, see BROKERS, 1.
New promise or acknowledgment of debt sufficient to remove bar of statute, see LIMITATION OF ACTIONS, 6.
Validity of oral trusts, see TRUSTS.

FRAUDULENT CONVEYANCES:

By insolvent corporation, see CORPORATIONS, 5, 6.
Purchase by wife of administrator of lands of estate to pay mortgage, see EXECUTORS AND ADMINISTRATORS, 6.

FUNDS:

Apportionment of common school fund for maintenance of normal training department, see SCHOOLS AND SCHOOL DISTRICTS.
Management and control of state funds, see STATES.

GAMBLING:

Selling pools on horse races as constituting offense, see GAMING.

GAMING:

1. GAMING—KEEPING GAMBLING RESORT—ELEMENTS OF OFFENSE—POOL SELLING. The keeping and having in charge of a public house or resort and engaging in betting, winning, and losing money in selling pools on horse races to persons congregating and resorting in such place for that purpose, may be informed against under Bal. Code, § 3096, providing that all public houses or places of resort where gambling is carried on or permitted are nuisances, and that the owners or keepers are punishable therefor as thereinafter provided; and this, whether or not selling pools on horse races is "gambling" within Bal. Code, § 7260, defining gambling and prescribing a punishment therefor; since the acts defined are not the only ones that constitute gambling. *State v. Shanklin*..... 35

GARNISHMENT:

Of claims before delivery to creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Exemptions from garnishment and protection of rights of exemption, see EXEMPTIONS.

Of assigned claims and publication of summons as conferring jurisdiction, see PROCESS.

GENERAL DENIAL:

See PLEADING, 1.

GIFTS:

Deed of gift, see DEEDS, 1, 2.

Delivery of deed in escrow with intent to make gift, see ESCROWS.

GRANTS:

Right of way over public lands, see HIGHWAYS.

Of public lands, see PUBLIC LANDS, 1.

GUARDIAN AND WARD:

Failure to properly appoint guardian for minor plaintiff suing for wrongful death, see DEATH, 2.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 44-60.

In prosecutions for murder, see HOMICIDE, 6.

HEIRS:

Determination of adverse claims to property purchased in name of wife, see QUIETING TITLE, 1.

HIGHWAYS:

Defects or obstructions in city streets, see MUNICIPAL CORPORATIONS, 11-27.

Establishment by county over land in possession of entryman, see PUBLIC LANDS, 3.

HIGHWAYS—CONTINUED.

1. HIGHWAYS—GRANTS—RIGHTS OF WAY—SETTLERS ON UNSURVEYED LAND—POSSESSORY RIGHTS. U. S. Rev. Stats., § 2477, granting rights of way over the unreserved public lands of the United States, and Laws 1903, p. 155, authorizing boards of county commissioners to accept by resolution such Congressional grant, do not amount to a grant *in praesenti*, as to unsurveyed lands in the possession of a *bona fide* settler; but the grant is held in abeyance until a highway is established by law (overruling *Okanogan County v. Cheetham*, 37 Wash. 682). *McAllister v. Okanogan County*..... 647

HOMICIDE:

Evidence in prosecution for, see CRIMINAL LAW, 1-3.
Civil liability for wrongful death, see DEATH.

1. HOMICIDE—MURDER IN THE FIRST DEGREE—INDICTMENT—DUPLICITY—STATUTES—CONSTRUCTION. Under Bal. Code, § 7035, making it murder in the first degree to kill another purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, an information is not bad for duplicity in alleging, in the language of the statute, a killing, purposely and of deliberate and premeditated malice and while engaged in the perpetration and attempt to perpetrate the crimes of robbery and burglary; in view of Bal. Code, § 6800, abolishing all forms of pleading, and § 6850, providing that no information shall be deemed insufficient if the crime is set forth in ordinary language in such a manner that a person of ordinary understanding may know what was intended. *State v. Fillpot*..... 223

2. SAME—INFORMATION—DEFINITENESS. Under Bal. Code, § 7035, making it murder in the first degree to kill another while in the perpetration or attempt to perpetrate a rape, arson, robbery, burglary, etc., it is not necessary to state the details of the acts included in the crimes of robbery and burglary alleged, but it is sufficient to allege the perpetration or attempt to commit any of the included crimes in the language of the statute. *State v. Fillpot*..... 223

3. HOMICIDE—INDICTMENT AND INFORMATION—CHARGE OF KILLING—SUFFICIENCY. An information for murder in the first degree sufficiently charges that the accused killed the deceased and the means by which it was done, where it alleges that he shot her by the use of a revolver pistol, producing a mortal wound from which she died the next day. *State v. Bridgham*..... 18

4. HOMICIDE—EVIDENCE—DYING DECLARATIONS. A dying declaration is admissible, although it did not contain the express declaration that deceased believed she was about to die and she did not actually so state, where it appears from other evidence that she believed she was *in extremis*, and did die from the illness from which she was suffering as the direct result of the injury. *State v. Bridgham*..... 18

HOMICIDE—CONTINUED.

5. SAME—EXTEMIS. It sufficiently appears that a dying declaration was made *in extremis*, where the deceased was informed by a physician that the wound was mortal, that she was rational and realized the fact and said that she did not think that she could get well, and gave directions as to her burial and the care of her children. *State v. Bridgham*..... 18

6. SAME—CONTENTS—PRIOR THREATS—INSTRUCTIONS. It is not error to admit in evidence a dying declaration which contained a statement of prior threats, where the jury were instructed not to consider any reference therein to threats made by the defendant. *State v. Bridgham* 18

7. HOMICIDE—DELIBERATION—EVIDENCE—SUFFICIENCY. There is sufficient evidence of deliberation in the murder of defendant's wife, where it appeared that they had quarreled the day before and on the morning of the shooting, and that they separated and defendant procured a revolver and returned, making a trip of two miles, drew his revolver while holding her, and shot her while she was running away. *State v. Bridgham*..... 18

8. HOMICIDE — PREMEDITATED MALICE—DELIBERATION—INSTRUCTIONS. An instruction as to premeditated malice that there need be "no particular" length of time between the formation of the intent to kill and the killing is not objectionable as failing to recognize that there must be deliberation and time therefor. *State v. Bridgham* 18

HORSE RACING:

Selling pools as constituting gambling, see GAMING.

HOTELS:

Enjoining use of name for hotel, see TRADE-MARKS AND TRADE-NAMES.

HUSBAND AND WIFE:

Actions for wrongful death of husband or wife, see DEATH.

Divorce and judicial separation, see DIVORCE.

Party defendant in action of ejectment, see EJECTMENT, 3.

Administration of community property, see EXECUTORS AND ADMINISTRATORS, 1.

Purchase of lands by wife of administrator to pay mortgage, evidence of fraud, see EXECUTORS AND ADMINISTRATORS, 6.

Conclusiveness of judgment against spouse, see JUDGMENT, 8.

Rights conferred by settlement on government land, see PUBLIC LANDS, 4.

Conclusiveness of judgment against entryman in land department, see PUBLIC LANDS, 6.

Determination of adverse claims to property purchased in name of wife and conveyed to owner, see QUIETING TITLE, 1.

Relief on cross complaint in action for separate maintenance as outside issues, see QUIETING TITLE, 2.

HUSBAND AND WIFE—CONTINUED.

1. HUSBAND AND WIFE—ACTION FOR PERSONAL INJURIES—PARTIES—JOINDER OF WIFE. Bal. Code, § 4827, authorizes an action by husband and wife to recover for personal injuries sustained by the husband. *Apker v. Hoquiam* 567

2. HUSBAND AND WIFE—COMMUNITY PROPERTY—WHAT LAW GOVERNS—DOMICILE. The status of property acquired by a husband and wife while residing in this state, is not governed by the laws of Ohio by reason of the fact that they made an agreement respecting the property while temporarily in Ohio on a visit, with a continuous intention of returning to their home in this state. *Stewart v. Kleinschmidt* 90

3. HUSBAND AND WIFE—PUBLIC LANDS—TITLE UNDER TIMBER ACT—SEPARATE ESTATE—RULE OF PROPERTY—STARE DECISIS. The decision of the supreme court made fifteen years ago, that property acquired by a married man under the timber and stone act is his separate estate is a rule of property in this state to which the doctrine of *stare decisis* applies in all its vigor. *James v. James* 60

4. SAME. The rule that property acquired under the timber and stone act is the separate property of the patentee is not affected by the fact that community property was used in its purchase; and it does not rest upon estoppel; nor would the title be affected by a claim of a divorced wife to community funds used in its purchase. *James v. James* 60

5. SAME—SEPARATE DEED FROM HUSBAND—PROPERTY OF WIFE. Under Bal. Code, § 4539, upon a deed of community realty from a husband to the wife, the same becomes her separate property, and is not liable for a community debt subsequently contracted by the husband. *Stewart v. Kleinschmidt* 90

6. SAME—COMMUNITY DEBT. A judgment founded on a transaction relating to dealings in the stock of a corporation and to a contract for assisting in the management of its affairs in the interest of the community is a community debt. *Stewart v. Kleinschmidt* 90

HYPOTHETICAL QUESTIONS:

In examination of expert witnesses, see EVIDENCE, 9.

IDEM SONANS:

Name of defendant in foreclosure summons, see TAXATION, 4.

IMPEACHMENT:

Of witness, see WITNESSES, 4.

IMPLIED REPEAL:

Statute authorizing appointment of receiver for mortgaged property, see MORTGAGES, 6.

Of act relating to management of funds of state college, see STATES.

Of statute, see STATUTES, 5.

IMPROVEMENTS:

Liability of land for preliminary costs of drainage district, see DRAINS.
Liens, see MECHANICS' LIENS.
Public improvements, see MUNICIPAL CORPORATIONS, 1-10.

INCOMPETENCY:

Of servants, see MASTER AND SERVANT, 2, 16.

INDEMNITY:

Inclusion of claim for attorney's fee in jurisdictional amount on appeal, see APPEAL AND ERROR, 3.

INDEPENDENT CONTRACTORS:

Parol evidence to show relation of subcontractor, see EVIDENCE, 6.
Contract constituting relation, see MASTER AND SERVANT, 1.
Liability of master for injuries by independent contractor, in general, see MASTER AND SERVANT, 26.

INDIANS:

1. INDIANS—PUBLIC LANDS—PATENTS—RESTRICTION AGAINST ALIENATION—WHAT LAW GOVERNS. Where an Indian made a settlement upon public lands under the act of 1875, which would have entitled him to a patent with a restriction against alienation for five years, but was not entitled to and did not make final proof until after the passage of the act of 1884, his patent should be issued under the act of 1884 with restrictions against alienation for twenty-five years. *Frazee v. Piper*..... 278
2. INDIANS—CONTRACTS—LANDS—CONVEYANCE—RESTRICTIONS AGAINST ALIENATION. A deed by an Indian holding land under a patent with restrictions against the power of alienation is void. *Frazee v. Piper* 278
3. INDIANS—ACTIONS—PARTIES—LEGAL CAPACITY TO SUE—EJECTMENT. Indians holding title to lands under a patent subject to a restriction on alienation for a period of twenty-five years, which will then ripen into a fee simple, have the legal capacity to maintain an action of ejectment to recover possession of the lands, without making the United States a party. *Frazee v. Piper*..... 278
4. SAME—COURTS—JURISDICTION. The state courts have jurisdiction of such an action. *Frazee v. Piper*..... 278

INDICTMENT AND INFORMATION:

See HOMICIDE, 1-3.
Offenses against laws against gambling, see GAMING.

INDUCEMENTS:

To commission of offense, see SEDUCTION, 2.

INFANTS:

Custody and support on divorce of parents, see DIVORCE, 2-5.
Warning and instructing minor employees, see MASTER AND SERVANT, 19.
Injuries from explosion of dynamite caps, see NEGLIGENCE.

INJUNCTION:

Obstruction of navigable stream, see NAVIGABLE WATERS, 2.
Infringement of trade-mark, see TRADE-MARKS AND TRADE-NAMES.

INSANE PERSONS:

Opinion evidence as to insanity, see CRIMINAL LAW.

INSOLVENCY:

Conveyances by insolvent corporation, see CORPORATIONS, 5, 6.

INSTRUCTIONS:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 11, 14.
Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 46, 59, 60.
In criminal prosecutions, see CRIMINAL LAW, 8; HOMICIDE, 8.
In civil actions, see TRIAL, 9-16.

INSURANCE:

Departure in pleading in action on policy, see PLEADING, 4.

1. INSURANCE—ACTIONS—PROOF OF DEATH—EVIDENCE—ADMISSIBILITY. An attending physician's certificate of death is admissible as part of the proofs of death, in an action on a benefit certificate, although it contains a clause giving the cause of death, which was an issue in the action. *Schon v. Modern Woodmen of America*..... 482
2. INSURANCE—ACTIONS—CAUSE OF DEATH—EVIDENCE — REMOTENESS. In an action upon a benefit certificate, evidence of a liquor bill for $30, owed by deceased and that the same was purchased for his own use, is too remote to require its admission upon an issue as to whether death resulted from intemperance. *Schon v. Modern Woodmen of America* 482
3. SAME—DEFENSES — INTEMPERANCE — STATEMENTS IN APPLICATION. In an action upon a benefit certificate, the defendant cannot rely upon a statement in the deceased's application that he had always been a total abstainer, where the application further stated that he was "almost" a total abstainer and drank beer once in a great while. *Schon v. Modern Woodmen of America*..... 482
4. SAME—INSTRUCTIONS—COMMENT. In an action upon a benefit certificate, an instruction giving, as the judge's best definition of "intemperate," the immoderate use of intoxicating liquor, with the comment that he did not know any more about it than he did before, is not erroneous. *Schon v. Modern Woodmen of America*..... 482

INSURANCE—CONTINUED.

5. SAME—INTEMPERANCE—INSTRUCTIONS. In an action upon a benefit certificate, providing that if the member should become intemperate in the use of alcoholic drinks, or if death resulted from intemperate use thereof, the certificate should be void, it is proper to instruct the jury that the deceased was not "intemperate" within the meaning of the certificate, even though he drank to excess upon exceptional occasions, unless he was addicted to periodical and excessive indulgences which became habitual. *Schon v. Modern Woodmen of America* 482

INTEMPERANCE:

Instructions in action on insurance policy, see INSURANCE, 4, 5.

INTENT:

In burglary, see BURGLARY.
Of grantor, see DEEDS, 1, 2.
Of grantor to make gift by delivery of deed in escrow, see ESCROWS.

INTEREST:

Failure to pay installment as accrual of right of action, see LIMITATION OF ACTIONS, 1.
Foreclosure of mortgage for nonpayment of interest, see MORTGAGES, 3.
Disqualification as witness, see WITNESSES, 2, 3.

1. INTEREST—TENDER. Interest will not be allowed on purchase money due after sufficient tender of the sum due. *Tacoma Water Supply Co. v. Dumermuth* 609

INTERROGATORIES:

In proceeding for discovery, see DISCOVERY.

INTOXICATING LIQUORS:

Injuries to third person by bartender, see MASTER AND SERVANT, 25.
Exclusion of evidence of intoxication in action for personal injuries, see MUNICIPAL CORPORATIONS, 17.

INTOXICATION:

Duty of carrier as to passenger under disability, see CARRIERS, 8, 9.

ISSUES:

Facts in issue under pleadings, see PLEADING, 10-13.
Relief on cross-complaint in action for separate maintenance as outside issues, see QUIETING TITLE, 2.
Instructions to jury, see TRIAL, 13.

JOINDER:

Of husband and wife in actions, see HUSBAND AND WIFE, 1.

JOINT TORT FEASORS:

Harmless error in direction of verdict as to one joint tort feasor, see APPEAL AND ERROR, 44.

Effect of judgment in favor of one joint feasor, see JUDGMENT, 1.

JUDGES:

Mandamus to compel judge to settle statement of facts, see APPEAL AND ERROR, 26.

JUDGMENT:

Review in general, see APPEAL AND ERROR.

Notice and bond on appeal from several judgments in consolidated actions, see APPEAL AND ERROR, 18.

Time for taking appeal in action to vacate tax judgment and sale, see APPEAL AND ERROR, 17.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 61, 62.

Effect as against stockholder of judgment against corporation, see CORPORATIONS, 2.

Presumption as to jurisdiction on collateral attack, see COURTS.

Decree in action for divorce, see DIVORCE.

Collateral attack on administrator's sale, see EXECUTORS AND ADMINISTRATORS, 7.

As community debt, see HUSBAND AND WIFE, 6.

Effect on prior chattel mortgagee not party to foreclosure, see MECHANICS' LIENS, 3.

Conclusiveness of decision against entryman in land department, see PUBLIC LANDS, 6.

In suits to quiet title, see QUIETING TITLE, 2.

1. JUDGMENT—AGAINST ONE OF TWO PARTIES—MUNICIPAL CORPORATIONS—STREETS—LIABILITY OF CITY AFTER VERDICT FOR CONTRACTOR—JOINT TORT FEASORS—TRIAL—VERDICT—EFFECT. In an action against a city and its contractor for personal injuries sustained upon a temporary sidewalk, alleged to have been constructed by the contractor, the direction of a verdict in favor of the contractor, because of insufficiency of the evidence as against him, does not preclude a recovery against the city. *Jones v. Seattle*..... 245

2. JUDGMENT—VACATION OF VOLUNTARY DISMISSAL—EXCUSABLE NEGLECT—DISCRETION OF COURT — CONTINUANCE — ABSENCE OF COUNSEL. The denial of the vacation of a judgment of voluntary dismissal, asked for on the ground of mistake, inadvertence and excusable neglect, is largely a matter of discretion; and no abuse of discretion is shown where it appears that the case was set for hearing on 10 a. m., that one of the plaintiff's counsel was present and asked for a continuance until the afternoon in order that other counsel familiar with the case could attend, but refused to consent to pay witness fees of one witness amounting to $2.50 a day as a condition for the continuance, and rather than do so, asked a dismissal of the suit with-

JUDGMENT—CONTINUED.

out prejudice, which was granted, there being no showing that counsel were misled; although by such dismissal the operation of the statute of limitations barred a recovery; since the neglect of counsel to know that the statute would run does not fall within the provisions of the statute, and counsel must take notice of the probability that cases will be called at the time they are assigned. *Anderson v. Shields*..... 463

3. SAME—COURTS—POWER TO REVIEW ORDERS—CORRECTION IN SAME COURT. After vacating, for inadvertence and surprise, an order vacating the denial of a new trial, the trial court has no discretion to vacate its last order, as it may not review its own orders for mere error of law. *Little Bill v. Dyslin*..... 675

4. SAME—DISCRETION. It is not an abuse of discretion to vacate an order denying a new trial, entered without notice to the moving party, after an agreement to submit the same at some future time to a visiting judge who died before the matter was submitted. *Little Bill v. Dyslin*..... 675

5. JUDGMENTS—VACATION—GROUNDS—NEW TRIAL—SURPRISE—COURTS—REVIEW BY SAME COURT. Bal. Code, § 4953, authorizes a trial court to review and vacate its own order denying a new trial, taken against a party through mistake, inadvertence, surprise or excusable neglect. *Little Bill v. Dyslin*..... 675

6. JUDGMENTS—CONCLUSIVENESS—COLLATERAL ATTACK. An action to quiet title and recover possession of land sold at an administrator's sale, alleged to have been made without jurisdiction, is a collateral attack upon the probate proceedings. *Magee v. Big Bend Land Co.*..... 406

7. JUDGMENT—BAR—DISMISSAL WITHOUT PREJUDICE. The dismissal of an action to foreclose a chattel mortgage "without prejudice," is not *res judicata* and does not bar a subsequent suit to foreclose the mortgage, although the former action was dismissed for want of sufficient evidence. *Averill Machinery Co. v. Allbritton*..... 30

8. JUDGMENT—PARTIES CONCLUDED—HUSBAND AND WIFE. Where a contest in the land department has been decided adversely to an entryman in possession, his wife and members of his family claiming through or under him are concluded by the decision of the department. *Delacey v. Commercial Trust Co*..... 542

9. JUDGMENTS—CONCLUSIVENESS—QUESTIONS THAT MIGHT HAVE BEEN LITIGATED—PARTITION—ACCOUNTING. A judgment in an action between co-tenants awarding to the defendants, after an accounting, an undivided one-half interest in the whole tract of thirty-two acres, upon the payment of a certain sum, which plaintiffs thereupon voluntarily received, is conclusive as to the defendants' right to sixteen acres in a subsequent action for a partition; and precludes the plaintiffs from claiming that a sale of ten acres of the tract, made by plaintiffs pending the first suit, was for the joint benefit

JUDGMENT—CONTINUED.

of both parties, where the defendants had no notice of such sale, and the plaintiffs received the purchase price without accounting therefor in the original suit, or offer to do so until after action for partition; since that question might have been determined in the original suit. *Snowden v. Anderson* 234

JUDICIAL NOTICE:

In civil actions, see EVIDENCE, 1.

JUDICIAL POWER:

See CONSTITUTIONAL LAW, 2.

JUDICIAL SALES:

Of property of decedent, see EXECUTORS AND ADMINISTRATORS, 5-7.
Of land for nonpayment of taxes, see TAXATION, 4-6.

JURISDICTION:

Admiralty jurisdiction, see ADMIRALTY.
Amount in controversy, see APPEAL AND ERROR, 1-4.
Appointment of receiver for insolvent corporation, see CORPORATIONS, 7.
Particular courts, see COURTS.
Evidence of venue in criminal prosecution, see CRIMINAL LAW, 3.
Administration proceedings, see EXECUTORS AND ADMINISTRATORS.
Of state courts in action of ejectment by Indian holding under patent subject to restrictions, see INDIANS, 4.
Want of jurisdiction as ground for collateral attack on judgment, see JUDGMENT, 6.
Of nonresident defendant, see PROCESS.
Of state courts to enforce lien for damage to bridge by vessel, see SHIPPING.

JURY:

Review of verdict on appeal, see APPEAL AND ERROR, 38-41.
Questions for jury in civil actions, see TRIAL, 7, 8.
Instructions in civil actions, see TRIAL, 9-16.

KNOWLEDGE:

Effect of ignorance of cause of action on limitation, see LIMITATION OF ACTIONS, 4.
Servant's knowledge of defect or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 4, 10, 23.
Of danger as affecting negligence of minor, see NEGLIGENCE.

LABOR:

See WORK AND LABOR.

LACHES:

Effect on equity, see EQUITY.
In suit to enforce specific performance, see SPECIFIC PERFORMANCE, 2.

LANDLORD AND TENANT:

Acceptance of lease as abandonment of claim by adverse possession, see ADVERSE POSSESSION, 2.
Property in crops, see CROPS.
Parol evidence to vary lease, see EVIDENCE, 4.

1. LANDLORD AND TENANT—LEASE—SUBLEASE—RELEASE OF TENANT. Subleases of different portions of demised premises, for less than the term of the original lease, do not constitute an assignment of the lease so as to release the lessee from liability for the rent. *Agen v. Nelson*..... 431

2. SAME—SUBSTITUTION. Acceptance of rent from subtenants of different portions of the demised premises under subleases for less than the original term does not release the original tenant where receipts were given in his name, and there was nothing further to show a substitution. *Agen v. Nelson*..... 431

3. SAME—UNLAWFUL DETAINER—PARTIES—POSSESSION BY SUBTENANT. Under Bal. Code, § 5527, an action of unlawful detainer for nonpayment of rent may be maintained against the original lessee where his subtenant was in possession and in default. *Agen v. Nelson*. 431

4. SAME — DAMAGES — TAXES. In an action of unlawful detainer against a tenant, and to recover rents, recovery may be had for the amount of taxes which the tenant had covenanted to pay. *Agen v. Nelson* 431

LANDS:

See PUBLIC LANDS.
Indian lands, see INDIANS.

LAPSE OF TIME:

See EQUITY.

LAW OF THE CASE:

Decision on appeal as law of the case on new trial, see APPEAL AND ERROR, 61, 62.

LEASES:

See LANDLORD AND TENANT.

LICENSES:

Payment of license as condition precedent to action, see CORPORATIONS, 4.
Physicians and surgeons, see PHYSICIANS AND SURGEONS.

LIENS:

Agricultural liens, see AGRICULTURE.
Judgment against corporation as lien on property of officer, see CORPORATIONS, 2.
On logs, see LOGS AND LOGGING.
Liens of mechanics and materialmen, see MECHANICS' LIENS.
For damage by vessel to bridge, see SHIPPING.
Tax lien, see TAXATION, 1-3.

LIMITATION:

Of amount affecting jurisdiction of courts, see APPEAL AND ERROR, 1-4.
Of actions, see LIMITATION OF ACTIONS.

LIMITATION OF ACTIONS:

Acquisition of school lands by adverse possession, see ADVERSE POSSESSION, 1.
Time for taking appeal or other proceeding for review, see APPEAL AND ERROR, 17.
Laches, see EQUITY.
Time for presentation of claims against decedent's estate, see EXECUTORS AND ADMINISTRATORS, 2, 4.
As defense in foreclosure of mortgage, see MORTGAGES, 4.
Right of entryman to set up by claim of adverse possession, see PUBLIC LANDS, 5.
Sufficiency of title relating to actions brought by city and state, see STATUTES, 2.
Barring of lien for taxes paid, see TAXATION, 2, 3.

1. LIMITATION OF ACTIONS—TIME—ACCRUAL OF RIGHT OF ACTION. Failure to pay an installment of interest, under a clause authorizing the payee to declare the whole debt due, does not start the running of the statute of limitations. *Weinberg v. Naher*..... 591

2. SAME—EXERCISE OF OPTION—NOTICE—SUFFICIENCY. Letters stating that a loan will be called in if the mortgagor does not in a week further secure the loan by an insurance policy, and that the mortgagee will insist on the policy or call in the loan, do not amount to an election to declare the whole sum due on account of default in the payment of interest. *Weinberg v. Naher*..... 591

3. LIMITATION OF ACTIONS — ABSENCES FROM STATE — DOMICILE. A judgment debtor is a nonresident of this state, within the meaning of Bal. Code, § 4808, tolling the statute of limitation during absence from this state, where she had her abode in Idaho and rented a house and taught school there since 1897, living with her daughter as the only member of her family, and only returned to this state to spend her vacation after being elected to teach in Idaho for another year; her visits to this state not being to the same place, nor to the farm where she claimed her home, the dwelling house thereon having been destroyed, and there being no usual place of abode in this state

LIMITATION OF ACTIONS—CONTINUED.
where service of process could be made upon her. *Dignam v. Shaff* 412

4. LIMITATION OF ACTIONS—FRAUD—CONCEALING MISTAKE—PLEADING. An action is not one for relief upon the ground of fraud, which would accrue only upon discovery of the fraud, where it is alleged that the plaintiffs sold defendants a car load of eggs, and attached a draft for the price according to the custom of merchants, which by mistake was $1,200 short, and that defendants, after consulting together, decided to conceal knowledge of the mistake, and that paying the draft and ceasing business transactions with plaintiff constituted a fraud on the plaintiffs, which they did not discover until three years subsequent to the sale; and the use of the word "fraud" in the complaint does not enlarge the meaning of the facts pleaded. *Evert v. Tower* 514

5. LIMITATION OF ACTIONS — TIME WHEN ACTION IS COMMENCED — STATUTES—CONSTRUCTION. Under Bal. Code, § 4807, which provides that the statute of limitations shall apply to actions brought by the state and municipalities, and that an action shall be deemed commenced when the complaint is filed, actions brought by private parties are not deemed commenced until the complaint is filed. *Blalock v. Condon* 604

6. LIMITATION OF ACTIONS — FRAUDS, STATUTE OF — NEW PROMISE. Under Bal. Code, § 4816, which provides that no acknowledgment or promise shall be sufficient to take a case out of the operation of the statute unless the same is in writing and signed by the party to be charged, correspondence relating to several promissory notes given at different times is not sufficient to remove the bar of the statute of limitations, where it consists of detached fragmentary statements of different dates susceptible of different interpretations, and there is no clear and unequivocal reference to any particular debt from which a promise can be implied to pay all or any one of the notes, but a controversy as to the amount due appears. *Bank of Montreal v. Guse* 365

LOCAL ASSESSMENTS:
For local improvements, see MUNICIPAL CORPORATIONS, 1-10.

LOCATION:
Of mining claim, see MINES AND MINERALS.

LOGS AND LOGGING:
Obstruction of navigation by booms, see NAVIGABLE WATERS, 4, 7, 8.

1. LOGS AND LOGGING—LIENS—PLEADING—ANSWER—ADMISSIONS—ISSUES AND PROOF. In an action to foreclose a logger's lien, an answer setting up a tender "at the time of the filing of the lien" and plaintiff's failure to make a demand before such filing, dispenses with plaintiff's proof of the filing of the lien, which defendant had denied on information and belief. *Sumpter v. Burnham* 599

LOGS AND LOGGING—CONTINUED.

2. SAME—FORECLOSURE—COSTS—DEMAND BEFORE SUIT — STATUTES — CONSTRUCTION. Under Laws 1899, p. 143, which forbids costs to holders of logger's liens who begin suit before demand for payment, unless the court shall find that the claimants had reasonable ground to believe that the owner was attempting to defraud the claimant, a demand before the filing of the lien will entitle the claimant to costs. *Sumpter v. Burnham*..... 599

MACHINERY:

Claim for rental of tools as constituting lien on property, see AGRICULTURE.

Opinion of expert as to proper guarding of, see EVIDENCE, 8.

Liability of employer for defects, see MASTER AND SERVANT.

Priority of mortgage lien over lien for repairs on engine, see MECHANICS' LIENS, 2.

MALICE:

Instructions as to premeditated malice, see HOMICIDE, 8.

MANDAMUS:

To compel settlement of statement of facts, see APPEAL AND ERROR, 26.

To compel filing of articles duplicating corporate names, see CORPORATIONS, 10.

Compelling certification of nominations for office, see ELECTIONS.

MARITIME TORTS:

Admiralty jurisdiction, see ADMIRALTY.

MASTER AND SERVANT:

Action by officer for salary and wrongful discharge from employment, see CORPORATIONS, 2.

Contracts of employment by corporation, see CORPORATIONS, 1-3.

Inadequate or excessive damages for injuries to servant, see DAMAGES, 4, 5.

Admissibility of mortality tables in action for personal injuries, see EVIDENCE, 3.

Parol evidence to show relation between contractor and subcontractor, see EVIDENCE, 6.

Opinion of expert as to guarding machinery, see EVIDENCE, 8.

Damages recoverable for wrongful discharge from employment, see WORK AND LABOR.

1. MASTER AND SERVANT—RELATION—TERMS OF CONTRACT. The terms of a written contract held to constitute the relation of an independent contractor. *Kendall v. Johnson*..... 477

MASTER AND SERVANT—CONTINUED.

2. MASTER AND SERVANT—EMPLOYMENT OF INCOMPETENT COSERVANT—EVIDENCE—SUFFICIENCY. A master who employs a stevedore as winch driver in loading a vessel must use reasonable effort to ascertain his qualifications, and cannot escape liability by showing that there was nothing in his conduct during two hours' employment indicating incompetency, or that he was a member of a union from which defendant was under contract to exclusively employ stevedores. *Pearson v. Alaska Pacific Steamship Co.*..... 560

3. MASTER AND SERVANT—INJURIES—FELLOW SERVANTS—SERVANTS OF OTHER EMPLOYER. Employees of a wheat shipper, engaged on the wharf in delivering sacks of wheat into a chute for loading a ship, are not "loaned" to the stevedores having the contract for loading the ship merely because they are under the direction of the stevedores' workmen, and so are not fellow servants of an employee of the stevedores engaged on the ship in receiving the sacks and loading the ship. *Stewart v. Balfour*..... 127

4. SAME—ASSUMPTION OF RISKS. In such a case, the plaintiff assumes the risk from the falling of a sack, which he knew happened several times a day, whether the same was due to negligence in placing the sacks in the chute or other causes. *Stewart v. Balfour* 127

5. MASTER AND SERVANT—ASSUMPTION OF RISKS—PROMISE TO REPAIR—CONDITIONAL PROMISE. The promise by the owner of a logging road, on the complaint of one employed as a locomotive engineer, to repair the railroad track at a dangerous curve as soon as its section boss returned, which would be in a "few days," relieves the servant of the assumption of risks, where, in less than a week, the want of repairs caused an accident before such return; there being no distinction between an unconditional promise to repair and one to repair after a definite date or event, where the accident happens before such date or event. *Morgan v. Rainier Beach Lumber Co.* 335

6. SAME—RIGHT TO RELY ON PROMISE—QUESTION FOR JURY. Whether a defect in a railroad track is so bad and apparent that no prudent servant would use the same in reliance upon a promise to repair, is for the jury, unless the evidence leaves room for no two opinions on the subject. *Morgan v. Rainier Beach Lumber Co.*..... 335

7. MASTER AND SERVANT—ASSUMPTION OF RISKS—PROMISE TO REPAIR—DEFINITENESS. A promise by a foreman to repair a chute as soon as he could do so, is sufficiently definite to relieve a servant in a mill from the assumption of risk. *Cook v. Pittock & Leadbetter Lumber Co.* 316

8. SAME—REASONABLE TIME FOR REPAIRS—QUESTIONS FOR JURY. Whether ten days was an unreasonable period for a servant to rely upon a promise to repair a chute, involving danger when occasionally cleaned out, is a question for the jury, where the repairs were in progress at the time of the accident and it was not shown when they were commenced. *Cook v. Pittock & Leadbetter Lumber Co.* 316

MASTER AND SERVANT—CONTINUED.

9. MASTER AND SERVANT—NEGLIGENCE—ISSUES AND PROOF. In an action for injuries to the operator of a shingle machine, evidence of negligence as to the use of a "filled-in" table, and in permitting children in the mill, is admissible where charged as negligence in the complaint. *Duskey v. Green Lake Shingle Co.*..... 145

10. MASTER AND SERVANT—PLEADING—ISSUES AND PROOF—ASSUMPTION OF RISKS—KNOWLEDGE OF DEFECT—PROMISE TO REPAIR. An action for personal injuries sustained by reason of a defective gasoline engine, which the master had promised to repair, does not fail upon withdrawal of issues relating to the promise, where it is alleged and shown that defendant did not know of the danger, although he did know of the defect, and that the defect was the proximate cause of the injury, and the defect was not so serious that the engine could not be used with care. *Meshishnek v. Seattle Sand & Gravel Co.* 382

11. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—PRIMA FACIE CASE. The doctrine of *res ipsa loquitur* may properly be applied to the relation of master and servant, where the facts eliminate blame on the part of the servant; the contrary rule being unreasonable and unjust in that it gives the master the benefit of the presumption in every case and the servant in none. *LaBee v. Sultan Logging Co.* 81

12. SAME. The doctrine of *res ipsa loquitur* is not confined to cases where one is the insurer of another's safety. *LaBee v. Sultan Logging Co.* 81

13. SAME—NEGLIGENCE—EVIDENCE OF NEGLIGENT OPERATION. In an action for personal injuries sustained through the negligent operation of a winch, it is proper to exclude evidence as to how another more complicated winch of different make is operated. *Pearson v. Alaska Pacific Steamship Co.*..... 560

14. MASTER AND SERVANT—NEGLIGENCE — EVIDENCE — CHANGES AFTER ACCIDENT—ADMISSIBILITY. In an action for injuries sustained by an employee in an alleged passageway, in which the defendant denied that the place was a passageway, evidence is admissible of a change widening the place after the accident, where the sole object thereof was to show that the place was intended to be used as a passageway. *Gustafson v. West Lumber Co.*..... 25

15. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE MACHINERY —EVIDENCE—ADMISSIBILITY. In an action for injuries sustained while cleaning out a defective chute for carrying away waste, requiring close proximity to the saws, it is not error to receive evidence of unguarded gears at another place, introduced for the purpose of showing that the chute could not be safely cleaned from that place, no recovery being sought on account of the unguarded gears. *Cook v. Pittock & Leadbetter Lumber Co.*..... 316

MASTER AND SERVANT—CONTINUED.

16. SAME—EVIDENCE OF CARE IN SELECTING SERVANTS—ADMISSIBILITY. Upon an issue as to whether a master had made reasonable effort to ascertain the competency of a stevedore employed as a winch driver in loading a vessel, evidence is inadmissible that the master was under contract to employ exclusively the members of a union, and relied upon the union to furnish a competent winch driver, where it further appears that the winch driver was incompetent and that neither the master nor the union, which was his agent, made any inquiries as to the competency of the employee. *Pearson v. Alaska Pacific Steamship Co*..... 560

17. SAME—EVIDENCE OF NEGLIGENCE—EXPERTS. As opinion evidence is inadmissible where the jury can deduce reasonable inferences without special skill or knowledge, it is proper, in an action for injuries sustained by a hatch tender through the negligence of an incompetent winch tender in not properly acting upon a signal given him, to exclude expert opinions as to whether a winch driver might mistake the levers, whether one familiar with winches could determine in two hours as to the competency of the winch driver or the propriety of his operation, and whether it was proper for plaintiff to take hold of the load so as to allow himself to be caught. *Pearson v. Alaska Pacific Steamship Co*..... 560

18. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. There is sufficient evidence of negligence on the part of a hotel keeper, in failing to maintain a safe place in which to work, where it appears that the linoleum on the floor of a room was so old and worn full of holes that it was unsafe to walk on, whereby a chambermaid, in the performance of her duties, was tripped and thrown down a step; and the question is for the jury where there was conflicting evidence. *Messir v. McLean* 140

19. MASTER AND SERVANT—NEGLIGENCE—NATURE AND CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. A recovery for injuries sustained by a boy while attempting to operate a band saw is not precluded by the fact that he could not explain how he came in contact with the saw, where it appears that he was but seventeen years of age, wholly without experience, and had been set to work without proper instructions, and was doing his work as best he could. *Von Postel v. Lake Sammamish Shingle Co*..... 261

20. MASTER AND SERVANT—INJURIES—FALL OF SACK IN LOADING SHIP—CONTRIBUTORY NEGLIGENCE—UNSAFE METHOD—EVIDENCE—SUFFICIENCY. An employee of stevedores loading a wheat ship, thrown down from a ladder by the fall of a wheat sack from the dock chute, is guilty of contributory negligence, as a matter of law, precluding any recovery for negligence in placing the sack in the chute, where it appears that he mounted the ladder to place a riffle in the chute while sacks were coming down at the rate of twenty per minute, that sacks frequently fall from the chute, and that he might have

MASTER AND SERVANT—CONTINUED.
directed the men to cease throwing in sacks while he was placing the riffle, and his use of the ladder at all was unusual and unnecessarily dangerous, and a safer way was well known to him. *Stewart v. Balfour* 127

21. SAME—GUARDING MACHINERY—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—QUESTIONS FOR JURY. Where an employee stumbled in a narrow passageway and fell onto a saw, the questions of his contributory negligence and assumption of risks, and of the master's negligence in failing to guard the saw under the factory act, are for the jury, where it appears that it was customary to use the place as a passageway, and there was specific evidence that the saw was not properly guarded and might have been; assumption of risks being no defense under the statutory duty to guard the saw. *Gustafson v. West Lumber Co*..... 25

22. MASTER AND SERVANT—DANGEROUS MACHINERY—ASSUMPTION OF RISKS—PROMISE TO REPAIR—EVIDENCE—SUFFICIENCY. The question of negligence and assumption of risks is for the jury where there was evidence that the operator of a shingle machine lost his fingers by reason of the open condition of the table, which was unsafe and which the employer had promised to repair or "fill-in", and that plaintiff continued work for but a short time in reliance on the promise; although there were inconsistencies in the plaintiff's claims, and it appeared that he was experienced and had worked on the machine about a year, and only made complaint in a moment of anger two days before the accident. *Duskey v. Green Lake Shingle Co.* 145

23. SAME—DEFECTIVE MACHINERY—ASSUMPTION OF RISKS—CONTRIBUTORY NEGIGENCE—QUESTION FOR JURY. In an action for injuries sustained by an operator of a gasoline engine, the plaintiff's assumption of risks and contributory negligence are for the jury, where it appears that plaintiff was employed to operate a steam engine, but at defendant's request undertook to operate a gasoline engine with which he had no experience and which was defective, that he operated it five or six weeks, starting it in the way he was instructed to do, whereby a spark set fire to oil that had been spilled by another employee without plaintiff's knowledge, causing an explosion of gasoline near an exhaust pipe, the plaintiff testifying that he knew of the defects in the engine but did not know of the danger. *Meshishnek v. Seattle Sand & Gravel Co*..... 382

24. SAME—TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE. It is not error to refuse requested instructions to the effect that a servant admitted that he knew and appreciated the dangers from working around an edger, where there was no such admission in the pleadings, as the court had no right to comment on the evidence. *Cook v. Pittock & Leadbetter Lumber Co*..... 316

MASTER AND SERVANT—CONTINUED.

25. MASTER AND SERVANT—INJURIES TO THIRD PERSON BY SERVANT—SCOPE OF EMPLOYMENT—INTOXICATING LIQUORS—DUTY TO KEEP ORDERLY PLACE. Where the owners of a saloon left the same in control of a bartender, they are liable in damages for the act of the bartender in setting fire to alcohol which he had poured into the shoe of a customer who had fallen asleep; since during the absence of the owners the bartender represented them in their duty to keep an orderly place. *Beilke v. Carroll* 395

26. SAME—LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR—BLASTING. A contractor on railroad work is, generally, not liable for injuries caused by a blast set off by an independent contractor to whom part of the work had been sublet, where the work was not unlawful or the injury due to defective plans or methods, and the work was being done in the mountains far from any human habitation, and was not so inherently dangerous in itself that it would probably result in injury to third persons. *Kendall v. Johnson*..... 477

MECHANICS' LIENS:

Amount involved on appeal from foreclosure, see APPEAL AND ERROR, 1.

Liens on logs and lumber, see LOGS AND LOGGING.

1. MECHANICS' LIENS — PERSONS ENTITLED — FURNISHING MATERIAL. The plaintiff is entitled to a lien for lumber furnished in the construction of defendant's house, where it appears that he worked in a mill and boarded with the defendants and agreed that lumber from the mill should be furnished to the defendants for use in building the house and the purchase price charged against his account for wages at the mill; and the fact that he handed defendants $60 to be applied in the same way on lumber bills would not constitute the transaction a loan, where it appears that it was his purpose to buy the lumber as his own material by using his wages and cash, and only handed the $60 to the defendants because of his inability to speak English and make himself understood at the mill office. *Popiella v. Zolawenski*..... 39

2. MECHANICS' LIENS—INTEREST LIENABLE—PRIOR MORTGAGE—PRIORITY. Under Bal. Code, § 5903, providing that a mechanics' lien shall be preferred to any lien or mortgage which attaches subsequently to the time of the commencement of the work, a mechanics' lien for repairs on a traction engine is inferior to the lien of a prior chattel mortgage, duly filed and indexed so as to give constructive notice before the commencement of the repairs. *Averill Machinery Co. v. Allbritton* 30

3. SAME—FORECLOSURE—PARTIES. A prior chattel mortgagee who was not made a party to the foreclosure of a mechanics' lien on a traction engine is not affected by the judgment of foreclosure sale. *Averill Machinery Co. v. Allbritton*..... 30

MINES AND MINERALS:

1. MINES AND MINERALS—LOCATION—BOUNDARIES—FAILURE TO ERECT MONUMENTS. The locator of a mining claim who fails to erect monuments or define the boundaries, assumes the risk of intervening rights of third parties. *Protective Mining Co. v. Forest City Mining Co.* 643

2. SAME—NOTICE—ABANDONED GROUND—POSSESSION—COLOR OF TITLE. A location notice on abandoned ground, coupled with possession and peaceful entry, is sufficient color of title as against a prior locator, although the notice fails to show that it was a relocation, where the defendants had never made any proper location; since one having no legal rights cannot question the right of one in peaceable possession. *Protective Mining Co. v. Forest City Mining Co.*..... 643

3. SAME—DISCOVERY—POSSESSORY RIGHTS. A discovery, after location of a mining claim and the posting of notices, is sufficient, in the absence of intervening rights, to complete possessory rights under the location. *Protective Mining Co. v. Forest City Mining Co.* 643

4. SAME—FORFEITURE—ASSESSMENT WORK—EVIDENCE. The evidence sufficiently shows a failure to do assessment work, working a forfeiture of the claim, where the locators merely paid in good faith $500 to parties who did no more than go upon the ground and make a pretense of doing the work. *Protective Mining Co. v. Forest City Mining Co.* 643

5. MINES AND MINERALS—MINING CLAIMS—ACTIONS—QUIETING TITLE—PLEADING—COMPLAINT—ALLEGING DISCOVERY OR RELOCATION. A complaint in an action to quiet title to a mining location alleging ownership, possession and adverse claim by defendants is not demurrable because it fails to allege an actual discovery of mineral or a relocation of abandoned ground, such matters being evidentiary. *Protective Mining Co. v. Forest City Mining Co.*..... 643

MISCONDUCT:

Of counsel, see TRIAL, 3, 6.

MISREPRESENTATION:

See FALSE PRETENSES.

MISTAKE:

Adverse possession of lands, mistake in boundary line, see BOUNDARIES.

Ground for opening or vacating judgment, see JUDGMENT, 2-5.

Concealing mistake as fraud affecting accrual of right of action, see LIMITATION OF ACTIONS, 4.

MITIGATION:

Of damages for diverting waters of stream by maintenance of boom, see NAVIGABLE WATERS, 8.
Of damages for wrongful discharge from employment, see WORK AND LABOR.

MODIFICATION:

Review of modified decree respecting custody of child, see DIVORCE, 3.
Of contract for sale of land, see VENDOR AND PURCHASER, 1-6.

MONEY:

Obtaining money under false pretenses, see FALSE PRETENSES.
Conversion of money, see TROVER AND CONVERSION, 1.

MONEY RECEIVED:

Recovery of tax paid, see TAXATION, 1-3.

MONOPOLIES:

Contract to build railroad as agreement in restraint of trade, see COMMERCE.

MONUMENTS:

Erection by locator of mining claim, see MINES AND MINERALS.

MOOT QUESTIONS:

Review on appeal, see APPEAL AND ERROR, 31.

MORTGAGES:

Of personal property, see CHATTEL MORTGAGES.
By donor as affecting donee's title to land, see ESCROWS, 3.
Notice to mortgagor of election to exercise option as accrual of right of action, see LIMITATION OF ACTIONS, 2.
Priority as between mortgage and mechanics' lien, see MECHANICS' LIENS, 2.
Right of mortgagee to lien for taxes paid, see TAXATION, 1-3.
Acceptance of notes and mortgage as waiver of forfeiture of payments, see VENDOR AND PURCHASER, 5, 6.

1. MORTGAGES—VALIDITY—FORM. Insufficiency in the form of a mortgage does not affect its validity as between the parties. *Spedden v. Sykes* 267

2. MORTGAGES—VALIDITY—FORM. A mortgage is not void merely because it fails to state the amount of the debt which it was given to secure. *Spedden v. Sykes*..... 267

MORTGAGES—CONTINUED.

3. MORTGAGES—MATURITY OF DEBT—OPTION TO DECLARE WHOLE DEBT DUE—WAIVER—TENDER OF OVERDUE PAYMENT. An option in a mortgage note to declare the whole debt due for default in payment of interest cannot be exercised after lawful tender of an overdue interest installment. *Weinberg v. Naher*..... 591

4. MORTGAGES—FORECLOSURE—LIMITATION OF ACTIONS—ESTOPPEL TO ASSERT—RENEWAL NOTES—CONSTRUCTION OF PROVISION FOR. A mortgagor is not estopped to set up the defense of the statute of limitations by a clause in a mortgage providing that if the debt is not paid at maturity the same may be renewed and said renewal note and interest shall be secured by the mortgage and continue a lien upon the premises until the debt and all renewals shall be fully paid; and the mortgage and note are barred by the lapse of six years after the last renewal. *Childs v. Smith*..... 457

5. MORTGAGES—FORECLOSURE—RECEIVERS—APPOINTMENT. A receiver may be appointed pending foreclosure of a real estate mortgage, where it appears that the mortgagors had abandoned the property and left for foreign lands and that a receiver is necessary to care for and protect the property and rent the same during the pendency of the action. *Collins v. Gross*..... 516

6. SAME—STATUTES—REPEAL—IMPLIED REPEAL. Bal. Code, § 5516, repealing Bal. Code, § 5456 in so far as it authorizes the appointment of a receiver for mortgaged real property because of insufficiency of the security, does not repeal by implication other provisions for the appointment of a receiver to save waste. *Collins v. Gross* 516

MORTUARY TABLES:

As evidence, see EVIDENCE, 3.

MOTIONS:

To dismiss appeal, see APPEAL AND ERROR, 29, 30.
Relating to pleadings, see PLEADING, 9, 13.

MUNICIPAL CORPORATIONS:

Harmless error in direction of verdict as to one joint tort feasor, see APPEAL AND ERROR, 44.
Ordinance regulating employment agencies as class legislation, see CONSTITUTIONAL LAW, 4.
Inadequate and excessive damages, see DAMAGES, 3.
Judicial notice of population of cities, see EVIDENCE, 1.
Judgment in favor of one joint tort feasor as affecting liability of city, see JUDGMENT, 1.

MUNICIPAL CORPORATIONS—CONTINUED.

Publication of notices in paper of general circulation, see NEWSPAPERS.

Sufficiency of title to acts relating to municipal government, see STATUTES, 2.

Lien for special assessments paid, see TAXATION, 3.

1. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT FOR BENEFITS—AWARD OF DAMAGES—EFFECT—BAR AS TO ASSESSMENTS. In condemnation proceedings to assess damages for a regrade, where the jury were instructed, pursuant to Laws 1893, p. 189, § 15, that the lot owners were entitled to recover all damages resulting to their property by reason of the regrade, less any local or special benefits arising from the proposed improvement, a verdict for $100 damages is conclusive on the question of the amount of the benefits, and precludes any subsequent assessment for benefits to the portion of the lots not taken; section 22 of the act providing that no lot shall be assessed in excess of benefits nor shall any lot which the jury shall have found to be damaged be assessed for any benefits. *Schuchard v. Seattle*..... 41

2. SAME—OFFSET OF DAMAGES—EFFECT. Where the benefits to property have once been offset against the damages for land taken in eminent domain proceedings, the land cannot be assessed for benefits from the improvement, regardless of the fact that the condemnation proceedings are entirely independent of the proceedings for assessment. *Schuchard v. Seattle*..... 41

3. SAME. An assessment for local benefits from an improvement cannot be sustained, after offset of the same against the damages, on the theory that conditions might have changed since the taking or damaging of the property; as the legislature did not intend that the question of benefits should be twice litigated. *Schuchard v. Seattle* 41

4. SAME—AWARD OF DAMAGES—VERDICT—BENEFITS. The jury, in awarding damages from a regrade under instructions to offset the benefits, could not have taken into consideration an assessment to be thereafter levied upon the property, they having no information as to the cost of the improvement or the limits of the district. *Schuchard v. Seattle*..... 41

5. SAME—WAIVER OF OBJECTIONS—PETITIONERS. Where an improvement is ordered by the unanimous vote of the city council regardless of a petition and limitations contained therein, it cannot be urged that the petitioners are estopped to object to assessments of their property. *Schuchard v. Seattle*..... 41

6. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—OBJECTIONS BEFORE CITY COUNCIL—WAIVER—JURISDICTION. The objection that property sought to be assessed is exempt, by reason of a verdict and judgment in condemnation proceedings determining that the same was damaged in excess of benefits, is jurisdictional, and is

MUNICIPAL CORPORATIONS—CONTINUED.
not waived by failing to file objections to the assessment before the city council, under Laws 1901, p. 240, § 2, providing that the assessment cannot be contested by any person not filing written objections to the assessment roll. *Seattle & Puget Sound Packing Co. v. Seattle* 49

7. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — CONFIRMATION—BY CITY COUNCIL—APPEAL—NOTICE. A notice of appeal from the city council's confirmation of a local assessment is sufficient if it so particularly describes the proceedings that respondent could not have been misled by an erroneous reference to the condemnation ordinance. *Barrett v. Seattle*..... 47

8. SAME—TRANSCRIPT. Notice to a city clerk of the filing of a transcript on appeal from the city council's confirmation of a local assessment is not jurisdictional, and is waived by a general appearance of the corporation counsel. *Barrett v. Seattle*..... 47

9. SAME—CERTIFICATION. Objections to the city clerk's certificate to the transcript on an appeal from an assessment to the superior court cannot be reviewed when the certificate is not brought up in the record in the supreme court. *Barrett v. Seattle*..... 47

10. SAME—AMENDMENT. A defect in the city clerk's certificate to the transcript on an appeal from an assessment to the superior court may be cured by amendment. *Barrett v. Seattle*..... 47

11. SAME—CONSTRUCTIVE NOTICE OF DEFECT. Constructive notice on the part of a city of a defective sidewalk is sufficiently shown where the walk had been constructed five years, and for some months ends of the boards had rotted away for a foot or more, and decayed on the under side leaving a thin shell, the nails had pulled out, and the boards were so loose that they rattled when walked on. *Billings v. Snohomish* 135

12. SAME—CONSTRUCTIVE NOTICE. The obstruction of a main street in a city by piles of gravel, for thirty days, imputes notice of its existence to the city. *Apker v. Hoquiam*..... 567

13. MUNICIPAL CORPORATIONS—STREETS—EXCAVATIONS—BARRIERS—SUFFICIENCY. Where a trench in an alley extending across a sidewalk was to be guarded simply over night, barriers are sufficient, as a matter of law, where a one-by-six board was nailed three or four feet above the walk to the corner of a building, two or three feet distant from the trench, and to a post at the outer edge of the sidewalk, with a ten-penny nail at each end of the board, and beneath the board a two by twelve plank, four feet long, was laid against the house and a similar one against the post and a third plank laid horizontally across the two, the place being well lighted by arc lights in the street on either side 150 feet distant from the alley, besides other lights from the building reflecting on the sidewalk. *Tagge v. Roslyn* 258

MUNICIPAL CORPORATIONS—CONTINUED.

14. MUNICIPAL CORPORATIONS—TORTS—STREETS—OBSTRUCTIONS—NOTICE OF CITY—PLEADING—SUFFICIENCY. A complaint alleging the existence of obstructions in a street and that the street was dark at night, "of all of which defendant had actual knowledge," refers both to the obstructions and darkness and sufficiently alleges notice on the part of the city. *Apker v. Hoquiam*..... 567

15. MUNICIPAL CORPORATIONS—STREETS—PLEADING—DESCRIPTION OF DEFECT—VARIANCE—PROOF OF INCIDENTAL MATTER. In an action for injuries sustained in a fall upon a sidewalk, alleged to have been occasioned by the maintenance on an incline of a smooth iron cover for a coal hole, without any protecting slugs, whereon the plaintiff slipped and fell, evidence that a projecting handle of the door caught plaintiff's foot as he slipped and fell is not a variance, and is admissible as an explanatory detail without previous allegation as to the door knob. *Smith v. Tacoma*..... 101

16. MUNICIPAL CORPORATIONS — STREETS — DEFECTIVE SIDEWALK — EVIDENCE—ADMISSIBILITY—APPEAL—HARMLESS ERROR. In an action for personal injuries sustained by a fall on a temporary sidewalk, alleged to have been constructed by a city contractor, it is not error to exclude evidence of a city inspector to the effect that the city had not put the walk in place; especially where he afterwards testified that he did not know who did place the same. *Jones v. Seattle*. 245

17. SAME—INTOXICATION OF COMPANIONS. In an action for injuries sustained on a temporary sidewalk, it is proper to exclude evidence of the intoxication of the persons accompanying the plaintiff. *Jones v. Seattle* 245

18. SAME—NECESSITY OF REPAIRS. In such a case, testimony bearing upon the public necessity of the repairs under way is properly excluded. *Jones v. Seattle*..... 245

19. MUNICIPAL CORPORATIONS—TORTS—STREETS—OBSTRUCTIONS—NOTICE —EVIDENCE. In an action for injuries sustained through the obstruction of a street by piles of gravel for thirty days, it is immaterial that gravel deposited was removed from time to time and other gravel deposited in its place, and evidence thereof is properly excluded. *Apker v. Hoquiam*..... 567

20. MUNICIPAL CORPORATIONS—STREETS—DEFECTIVE SIDEWALK—CONDITION AFTER ACCIDENT—EVIDENCE—ADMISSIBILITY. In an action for injuries sustained on a sidewalk within one hour after midnight, evidence is admissible of the condition of the walk a few hours thereafter, just before daylight, and long before street cars commenced running or before there was any traffic on the street. *Jones v. Seattle* 245

21. MUNICIPAL CORPORATIONS — STREETS — DEFECTIVE SIDEWALK—EVIDENCE—SUFFICIENCY. A walk is shown to be dangerous where a stringer had entirely rotted away, so that, when a plank was stepped

MUNICIPAL CORPORATIONS—CONTINUED.
on at one end by plaintiff's companion, the other end raised up and tripped the plaintiff. *Billings v. Snohomish* 135

22. SAME—COVER OVER COAL HOLE—NEGLIGENCE—NOTICE—QUESTIONS FOR JURY. In an action for injuries sustained by a fall upon a slippery iron cover of a coal hole, maintained on an inclined sidewalk, evidence that the cover was worn smooth and slippery and had been in use several years is sufficient to make a question for the jury as to the negligence of the city and constructive notice of the defect, although rain at the time appears to have been an element. *Smith v. Tacoma* 101

23. SAME—DEFENSES—PLAINTIFF'S NOTICE OF OBSTRUCTIONS. Contributory negligence is a question for the jury, where it appears that the plaintiff was injured by driving at night upon piles of gravel obstructing a street, and that he drove along the street the same morning and saw or should have seen the obstructions at that time. *Apker v. Hoquiam* 567

24-26. MUNICIPAL CORPORATIONS—ACTIONS—CLAIMS—AS CONDITION PRECEDENT—REASONABLENESS OF REQUIREMENTS. It is an unreasonable requirement that a claimant for damages against a city shall state his residence for one year last past, in a claim to be filed with the city, as a condition precedent to action against the city, and hence one that the city has no power to enforce by ordinance. *Jones v. Seattle* 245

Wurster v. Seattle 654

Hase v. Seattle 174

27. SAME—CLAIM—DESCRIPTION OF DEFECT—SUFFICIENCY. A claim for damages against a city for personal injuries sufficiently describes the nature of the defect when it alleges that the injury was caused by the claimant's "falling through a defective sidewalk," under the rule requiring claims to be as liberally construed as a pleading. *Hase v. Seattle* 174

MURDER:

See HOMICIDE.

MUTUAL BENEFIT INSURANCE:

See INSURANCE.

NAMES:

Duplication of corporate name, see CORPORATIONS, 8-10.
Misrepresenting name as element of crime, see FALSE PRETENSES.
Of owner in publication of summons, see TAXATION, 4-6.
Enjoining use of name for hotel, see TRADE-MARKS AND TRADE-NAMES.

NAVIGABLE WATERS:

Admiralty jurisdiction to enforce remedy for maritime torts, see ADMIRALTY.

NAVIGABLE WATERS—CONTINUED.

1. NAVIGABLE WATERS—NAVIGABILITY. Where a channel in a navigable river between the shore and a sand bar is navigable by row boat at half tide, and at full tide carries six feet of water, the same is navigable in fact. *Judson v. Tide Water Lumber Co.*..... 164

2. NAVIGABLE WATERS—RIPARIAN RIGHTS—OBSTRUCTIONS. Riparian owners on a navigable tidal river have the right to have the waters flow by their lands in a natural way, and to prevent obstructions or diversion thereof whereby their banks are being washed away; and in such case equity has power to order the removal of the obstructions, in addition to awarding damages. *Judson v. Tide Water Lumber Co.* 164

3. SAME—DEFENSES—RIPARIAN RIGHTS—OWNERS OF TIDE LANDS. The ownership of tide lands by a riparian owner along the bank of a navigable river does not give any right to place obstructions in the river diverting the flow of the waters to the damage of other riparian owners. *Judson v. Tide Water Lumber Co.*..... 164

4. NAVIGABLE WATERS—OBSTRUCTIONS—DAMAGES FROM BOOM—ACT OF GOD. The maintenance of a boom in a navigable river whereby the overflow from extraordinary floods is turned against and washes away the opposite banks, renders the owner of the boom liable for the damages; and the same cannot be excused on the plea that an extraordinary flood is an act of God, where floods of equal or greater force had been known six or seven times, since the flood might have been reasonably anticipated. *Kuhnis v. Lewis River Boom and Logging Co.* 196

5. SAME—DAMAGES FOR OBSTRUCTING RIVER—EXCESSIVENESS. A judgment for $11,250 damages for the obstruction of a navigable river, whereby the water was diverted and two and a quarter acres of the plaintiffs' land washed away, is not excessive, where there was evidence that the land was worth $5,000 per acre. *Judson v. Tide Water Lumber Co.*..... 164

6. NAVIGABLE WATERS—RIPARIAN RIGHTS—OBSTRUCTIONS—DAMAGES—EXCESSIVENESS. A judgment for $950 damages for the obstruction of a navigable river, whereby the water was diverted, resulting in the washing away of nineteen one-hundredths of an acre of land, of the value of $5,000 per acre, will not be held excessive from the fact that surveys of the land showed an accretion instead of a loss to the tract, where it appears that the accretion was due to the owner's efforts in protecting the head of the land, and to the construction of a bridge upstream, while loss was occasioned downstream at the foot of the land by defendant's obstruction. *Ami Co. v. Tide Water Lumber Co.* 171

7. SAME—INSTRUCTIONS. In an action for damages from the maintenance of a boom in a navigable river, causing a flood to wash away the opposite banks, error in instructing that an extraordinary flood is an act of God, imposing no liability upon the owner of the

NAVIGABLE WATERS—CONTINUED.
boom for damage done, is not cured by a subsequent instruction to the effect that there would be no liability if the damage was caused by sudden unusual floods that could not be anticipated or guarded against; prejudice being presumed from error until the contrary conclusively appears from the record. *Kuhnis v. Lewis River Boom and Logging Co.* 196

8. SAME—DAMAGES—MITIGATION. In an action for damages for diverting flood waters of a stream and washing away plaintiff's barn and contents, it is error to instruct that the plaintiff cannot recover any damage for their loss, if he refused to permit the defendant to remove the property to another location of safety; since plaintiff was not bound to incur extraordinary expense disproportionate to the results, and there would be at least an element of damage in the choice of location and value of the property after it was moved. *Kuhnis v. Lewis River Boom and Logging Co.*..... 196

NECESSITY:

For tender, see TENDER, 1.

NEGLECT:

Vacation of judgment for mistake and excusable neglect, see JUDGMENT, 2-5.

NEGLIGENCE:

Of bailee, see BAILMENT.
Personal injuries to passengers in general, see CARRIERS, 7-14.
Inadequate and excessive damages, see DAMAGES, 3-5.
Causing death, see DEATH.
Of employers, see MASTER AND SERVANT.
Risks assumed by servant, see MASTER AND SERVANT, 4, 5, 7, 10, 20-23.
Act of servant constituting negligence as against third persons, see MASTER AND SERVANT, 25, 26.
Master's liability for negligence of independent contractor in general, see MASTER AND SERVANT, 26.
Injuries from defects or obstruction in streets, see MUNICIPAL CORPORATIONS, 11-27.
Of person injured by defects or obstructions in street, see MUNICIPAL CORPORATIONS, 23.

1. NEGLIGENCE — DANGERS ATTRACTIVE TO CHILDREN — CONTRIBUTORY NEGLIGENCE. It is a question for the jury whether a boy eleven years of age was guilty of contributory negligence in attempting to explode dynamite caps by contact with dry batteries. *Akin v. Bradley Engineering & Machinery Co.*..... 658

2. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. An instruction that if the plaintiff was guilty of contributory negligence which directly and proximately contributed to his injury, is not objectionable as failing to define contributory negligence, as it in

NEGLIGENCE—CONTINUED.

effect defines it as such negligence on the part of the plaintiff as helped to produce the injury. *Akin v. Bradley Engineering & Machinery Co.* 658

3. SAME—DANGERS ATTRACTIVE TO CHILDREN—KNOWLEDGE OF DANGER. An instruction on the subject of contributory negligence of a boy is not objectionable in that it failed to define the degree of knowledge that he must possess to render him responsible; it being sufficient to state that the jury must take into consideration the amount of prudence, care and judgment which would ordinarily and reasonably be expected of a boy of his age, under the circumstances. *Akin v. Bradley Engineering & Machinery Co.* 658

NEWLY DISCOVERED EVIDENCE:

Ground for new trial, see CRIMINAL LAW, 4-7; NEW TRIAL.

NEW PROMISE:

Within statute of limitations, see LIMITATION OF ACTIONS, 6.

NEWSPAPERS:

Publications disqualifying candidate for office, see ELECTIONS.

1. NEWSPAPERS—LEGAL PUBLICATIONS—DAILY PAPERS. A newspaper printed every day except Sunday and Monday is a daily newspaper, within the meaning of an ordinance requiring the publication of official notices in a daily paper. *Fairhaven Publishing Co. v. Bellingham* 108

2. NEWSPAPERS—WHAT CONSTITUTES—CONTENTS. The noon edition of a newspaper, of eight pages, 18 inches by 23, issued regularly every day, containing telegraphic, sporting, political and theatrical news, advertisements and editorials, with an average daily circulation of over one thousand copies, sold on the street, without a subscription list at the time of submitting its bid, is a newspaper, in contemplation of our statutes relating to city printing. *Times Printing Co. v. Star Publishing Co.* 667

3. NEWSPAPERS—WHAT CONSTITUTES—GENERAL CIRCULATION. A newspaper published in a city having a population of 275,000, having an average daily circulation of 1,000 copies, sold on the street, and a subscription list of 360, at the time of the acceptance of its bid, but with no circulation in the residence districts and rarely seen in business or professional offices, is not a newspaper of general circulation, within the meaning of charter provisions requiring city printing to be let to such papers; and the city is properly enjoined from entering into a contract for public printing awarded by the city council to such a paper. *Times Printing Co. v. Star Publishing Co.* 667

NEW TRIAL:

Review of rulings on motion as involving discretion of court, see APPEAL AND ERROR, 37.

Decision on appeal as law of the case on new trial, see APPEAL AND ERROR, 61, 62.

In criminal prosecutions, see CRIMINAL LAW, 4-7.

Opening or vacating judgment, see JUDGMENT, 3-5.

1. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—LACK OF DILIGENCE. A new trial asked on the ground of newly discovered evidence is properly denied for want of diligence, where the action was for drawing architect's plans, and the new evidence was that of expert witnesses at the trial who had since made an examination of the plans and claimed that they were defective. *Kenway v. Hoffman* 105

2. SAME—CONTROVERTED AFFIDAVITS — DISCRETION. Where affidavits in support of a motion for a new trial for newly discovered evidence are controverted by affidavits by the adverse party, it is discretionary to grant or refuse a new trial. *Kenway v. Hoffman*..... 105

3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—SURPRISE—DILIGENCE. In an action for goods lost in transit, it is error to grant plaintiff a new trial for newly discovered evidence and surprise, in that two witnesses for defendant testified that a release of liability was signed in their presence by defendant's wife, while an agent of the defendant had admitted to plaintiff's counsel before the trial that there was a dissimilarity in the signatures, leading counsel to expect that such defense would be abandoned, where it appears that such release was set up as a defense, a bill of particulars was furnished in answer to a demand as to when and in whose presence the release was signed, and the wife's signature and authority were admitted in the reply, and the matter was fully gone into on the taking of depositions, and no suggestion of surprise was made at the trial or until after an adverse decision in the cause. *Jensen v. Spokane Falls & Northern R. Co.*..... 448

NOMINATIONS:

For office, see ELECTIONS.

NONINTERVENTION WILLS:

Administration and proceedings under, see EXECUTORS AND ADMINISTRATORS, 2-4.

NONRESIDENCE:

Effect on limitation, see LIMITATION OF ACTIONS, 3.

NORMAL SCHOOLS:

Apportionment of common school fund for maintenance of model training school, see SCHOOLS AND SCHOOL DISTRICTS.

NOTICE:

Of appeal, see APPEAL AND ERROR, 17-19.
Of filing proposed statement of facts, see APPEAL AND ERROR, 25.
Duty to ascertain condition of passenger as to sobriety, see CARRIERS, 7.
Filing of mortgage as notice to subsequent leinor, see CHATTEL MORTGAGES.
Judicial notice, see EVIDENCE, 1.
Time to present claims, see EXECUTORS AND ADMINISTRATORS, 2, 4.
To mortgagor of election to exercise option as affecting accrual of right of action, see LIMITATION OF ACTIONS, 2.
Defects or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 4, 10, 23.
Location notice on abandoned ground as color of title, see MINES AND MINERALS, 2.
Waiver of notice of filing transcript on appeal from confirmation of assessment, see MUNICIPAL CORPORATIONS, 8.
Of appeal from council's confirmation of assessment, see MUNICIPAL CORPORATIONS, 7.
Knowledge of defects in street by person injured, see MUNICIPAL CORPORATIONS, 23.
Defects or obstructions in street as affecting liability for negligence, see MUNICIPAL CORPORATIONS, 11, 12, 14, 19, 22.
Claim for injury from defects or obstructions in street, see MUNICIPAL CORPORATIONS, 24-27.
Publication in official newspapers, see NEWSPAPERS.
In foreclosure of delinquency tax certificate, see TAXATION, 5, 6.

OBJECTIONS:

Review as dependent on objection made on trial, see APPEAL AND ERROR, 6-9.
To proceedings to establish drainage district, see DRAINS.
To assessment for public improvements, see MUNICIPAL CORPORATIONS, 5, 6.
To clerk's certificate of transcript on appeal from assessment proceedings, see MUNICIPAL CORPORATIONS, 9.
To pleadings and waiver thereof, see PLEADING, 13.
Waiver of objections to tender, see TENDER, 2.
At trial, see TRIAL, 1, 2.

OBSTRUCTIONS:

In city street as cause of injuries, see MUNICIPAL CORPORATIONS, 12, 14, 19, 23.
Of navigation, see NAVIGABLE WATERS.

OCCUPANCY:

Of public land by settlers, see PUBLIC LANDS.

OFFICERS:

Action by officer for salary, see CORPORATIONS, 2.
Transmission of funds to state treasurer, see STATES.

OFFSET:

See SET-OFF AND COUNTERCLAIM.
Of rents and profits against damages in action on bond to assure title, see BONDS.

OPINIONS:

As evidence in action for death of passenger, see CARRIERS, 11.
In criminal prosecution, see CRIMINAL LAW, 2.
In civil actions, see EVIDENCE, 8, 9.
As evidence of negligence, see MASTER AND SERVANT, 17.

OPTION:

Parol evidence to show intent of parties, see EVIDENCE, 7.
Notice to mortgagor of election to exercise option as accrual of right of action, see LIMITATION OF ACTIONS, 2.
Waiver of right to declare debt due for default in payment of interest, see MORTGAGES, 3.
Optional contract for purchase of land, see VENDOR AND PURCHASER, 5, 8, 9.

ORAL EVIDENCE:

See EVIDENCE, 4, 7.

ORDINANCES:

Regulation of employment agency as class legislation, see CONSTITUTIONAL LAW, 4.

OWNERSHIP:

Right and title to crops, see CROPS.

PARENT AND CHILD:

Costs on appeal in action by divorced parties for support of child, see COSTS, 2.
Custody and support of children on divorce, see DIVORCE, 2-5.

PAROL EVIDENCE:

See EVIDENCE, 4, 7.
To show intent of grantor, see DEEDS, 2.
To establish trust, see TRUSTS.

PARTIES:

Notice of appeal on party defendant in default, see APPEAL AND ERROR, 19.
Rights and liabilities as to costs, see COSTS.
Right to sue for wrongful death, see DEATH, 2, 3.
In ejectment, see EJECTMENT, 3.

PARTIES—CONTINUED.
Right of Indian to sue in ejectment, see INDIANS, 3.
Judgment in favor of one joint tort feasor as affecting liability of city, see JUDGMENT, 1.
Persons concluded by judgment, see JUDGMENT, 8, 9.
Unlawful detainer of demised premises, see LANDLORD AND TENANT, 3.
On foreclosure of mechanics' lien, see MECHANICS' LIENS, 3.
Action in firm name by partnership, see PARTNERSHIP.
Concluded by judgment in contest before land department, see PUBLIC LANDS, 6.
In suit for specific performance, see SPECIFIC PERFORMANCE, 1.
Competency as witnesses, see WITNESSES, 1-3.

PARTITION:
Conclusiveness of judgment in former action, see JUDGMENT, 9.

PARTNERSHIP:
Delegation of authority on employment of member of firm, see ATTORNEY AND CLIENT, 1.
1. PARTNERSHIP—ACTIONS—SUIT IN FIRM NAME—ATTORNEY AND CLIENT. Where two persons form a copartnership for the practice of the law and the firm is entitled to the emoluments of the firm and each of its members, the firm may maintain an action in the firm name to recover for services of any member. *Thorp v. Ramsey*.. 530

PARTY WALLS:
1. PARTY WALLS—AGREEMENT RUNNING WITH LAND—INTENTION—CONSTRUCTION OF CONTRACT. A party wall agreement runs with the land, and a conveyance of the lot on which the building was erected passes to the grantee the right to enforce payment for the wall when used, where that was the intention of the parties, and such an intention sufficiently appears where the agreement binds the owners of the adjoining lot, "their heirs, executors, administrators and assigns" to pay for one-half of the wall whenever they build or use the wall. *Sandberg v. Rowland*..... 7
2. SAME—PAYMENT—TRIAL—AGREED STATEMENT OF FACTS. An agreed statement of facts showing that defendants paid one Z for a party wall after Z had conveyed the property to the plaintiffs and while plaintiffs were in possession, sufficiently shows that defendants had not paid the plaintiffs therefor. *Sandberg v. Rowland*..... 7

PATENTS:
Sufficiency of title to support ejectment, see EJECTMENT, 1.
Issuance with restriction against alienation, see INDIANS, 1.

PAYMENT:
Compensation under contract, see CONTRACTS, 1.
Of license fee by corporation, see CORPORATIONS, 4.
Demand before suit as affecting right to costs on foreclosure of lien, see LOGS AND LOGGING.

PAYMENT—CONTINUED.
Agreed statement of facts as showing failure to pay for party wall, see PARTY WALLS.
Vendee's inability to pay cash as defense to action for nondelivery, see SALES, 3.
Of funds of state college to state treasurer, see STATES.
Taxes, see TAXATION, 1-3.
Price of land sold, see VENDOR AND PURCHASER, 4-8.

PERFORMANCE:

Or breach of contract, see CONTRACTS.
Possession by mortgagor to take trust out of operation of statute of frauds, see TRUSTS.

PERSONAL INJURIES:

See NEGLIGENCE.
Harmless error in direction of verdict as to one joint tort feasor, see APPEAL AND ERROR, 44.
To passenger, see CARRIERS, 7-14.
Inadequate and excessive damages, see DAMAGES, 3-5.
Parties in action for injuries to husband, see HUSBAND AND WIFE, 1.
Judgment in favor of one joint tort feasor as affecting liability of city, see JUDGMENT, 1.
To employee, see MASTER AND SERVANT.
From defects or obstructions in street or public place, see MUNICIPAL CORPORATIONS, 11-27.

PETITION:

For sale of decedent's property, see EXECUTORS AND ADMINISTRATORS, 5.

PETITIONERS:

Estoppel to object to assessment by reason of council ordering improvement, see MUNICIPAL CORPORATIONS, 5.

PHYSICIANS AND SURGEONS:

Competency as expert witnesses, see CRIMINAL LAW.
Certificate of death as proof of death, see INSURANCE, 1.
Sufficiency of title of act to regulate practice of, see STATUTES, 4.

1. PHYSICIANS AND SURGEONS—LICENSE—OFFENSES—WHAT CONSTITUTES PRACTICING—ADVERTISING AS "DR."—STATUTES—CONSTRUCTION. It is competent for the legislature to prohibit advertisement or the use of the words "Physician" and "Doctor" without first securing a license as a physician, and to provide that such use shall constitute "practicing medicine"; and it is immaterial that the words were used in connection with "Osteopathic and Magnetic" or "Drugless," or that the abbreviation "Dr." was employed in place of "Doctor." *State v. Pollman*..... 110

PLACE:

Of delivery of goods by carrier, see CARRIERS, 1.

PLEADING:

See SET-OFF AND COUNTERCLAIM.
Reduction by amendment of amount in controversy as affecting review, see APPEAL AND ERROR, 4.
Review of rulings as dependent in presentation of question in lower court, see APPEAL AND ERROR, 5, 10.
Review of rulings as dependent on presentation in record, see APPEAL AND ERROR, 20, 21.
Presumption as to amendment, see APPEAL AND ERROR, 35.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 47-50.
In action to recover money deposited for safe keeping, see BAILMENT, 3.
For broker's compensation, see BROKERS, 3.
Payment of license as condition precedent to action, see CORPORATIONS, 4.
In action for relief on ground of fraud, see LIMITATION OF ACTIONS, 4.
Filing complaint as commencement of action, see LIMITATION OF ACTIONS, 5.
In action to enforce lien on logs, see LOGS AND LOGGING.
For injuries to servant, see MASTER AND SERVANT, 9, 10.
In action to quiet title to mining claim, see MINES AND MINERALS, 5.
Amendment to cure defect in transcript on appeal from assessment proceedings, see MUNICIPAL CORPORATIONS, 10.
For injuries from defects or obstructions in streets, see MUNICIPAL CORPORATIONS, 14, 15.
Agency, authority of agent, see PRINCIPAL AND AGENT.
In action on assignment of contract, see PRINCIPAL AND AGENT, 2.
In suits to quiet title, see QUIETING TITLE, 2.
In action on contract to purchase land, see VENDOR AND PURCHASER, 9.

1. PLEADING—COMPLAINT—SEPARATE STATEMENT OF CAUSES. Under Bal. Code, § 4942, several causes of action must be separately stated, even in equity, or the complaint will be struck out. *Hockersmith v. Ferguson* 256
2. PLEADING—ANSWER—DENIAL ON INFORMATION. A denial, on information and belief, as to the filing of a lien notice in the county auditor's office is insufficient. *Sumpter v. Burnham*..... 599
3. PLEADING—ANSWER—TRIAL—SHIFTING BURDEN OF PROOF. In an action to recover money loaned, payable on demand, an answer admitting the receipt of the money for another specific purpose does not shift the burden of proof, or release the plaintiff from proving the obligation to pay upon demand. *Stamaty v. Pappadamitriu* 221
4. PLEADING—REPLY—DEPARTURE—INSURANCE—ACTION ON POLICY. In an action upon life insurance policies where the complaint was in usual form, and the answer alleged breach of warranty and false

PLEADING—CONTINUED.

representations as to the health of the deceased in making the application, it is not a departure in pleading for the reply to set up an estoppel to interpose those defenses by the act of its physician in examining the deceased and assuring him that he was in good health and free from disease; since it was incumbent upon the defendant to allege the breach of warranty and plaintiff need not anticipate defenses. *Ferrandini v. Bankers Life Association*..... 442

5. SAME. It is not a departure in pleading that a complaint in an action on life insurance policies alleged that the deceased applied for the insurance, and the reply alleged that the defendant solicited the insurance, as the same is immaterial. *Ferrandini v. Bankers Life Association* 442

6. PLEADING—REPLY—DEPARTURE. In an action to recover upon a *quantum meruit* for services rendered in plowing defendant's land, it is a departure in pleading to allege, in reply to an answer setting up a lease, that plaintiffs were in possession as tenants of the defendant at the time of the plowing, and that defendant afterwards breached the terms of the lease by serving notice upon plaintiffs to quit and taking possession of the land. *Smart v. Burquoin*.. 274

7. PLEADING — DEMURRER — RENEWAL AFTER ANSWER — DISCRETION. After overruling a demurrer to a complaint, and answer over by the defendants, it is discretionary to permit a renewal of the demurrer. *Blalock v. Condon*..... 604

8. SAME—ATTORNEY AND CLIENT—SERVICES. In an action to recover for services in conducting two suits, the defendant is not entitled to a bill of particulars itemizing the charges for each step taken preparing for trial, but it is sufficient if he is informed that the services were performed in connection with those certain actions. *Thorp v. Ramsey*..... 530

9. PLEADING—CERTAINTY—BILL OF PARTICULARS. The denial of a motion to make a complaint more definite and certain is not error when the same result is accomplished by ordering a bill of particulars. *Thorp v. Ramsey*..... 530

10. PLEADING—AFFIRMATIVE DEFENSES—ISSUES AND PROOF. In an action upon a bond given to secure the plaintiffs the cost of making "necessary" improvements upon property purchased, the issue as to the necessity of improvements is raised by a general denial, and it is not error to strike out an affirmative defense that the improvements made were not necessary within the meaning of the bond. *Kumblad v. Allen*..... 425

11. PLEADING—ISSUES AND PROOF—BILLS AND NOTES. Under an affirmative answer that the maker of a note was not to be bound either as principal or surety, evidence to show the nature of the debt under the laws respecting community property and suretyships is not within the issues. *Anderson v. Mitchell*..... 265

PLEADING—CONTINUED.

12. SAME—ISSUE AND PROOF—FAILURE OF PROOF. In an action to recover money loaned, payable on demand, in which the court ruled that the burden of proof was upon the defendants to establish their affirmative defense that money admittedly received was paid upon a contract to purchase land which the plaintiff refused to carry out, a judgment for plaintiff cannot be sustained upon the theory of an action for money had and received, where the only evidence was that of the defendants substantiating their defense, there being no proof of an obligation to pay on demand or any offer to amend the complaint to conform to the proofs. *Stamaty v. Pappadamitriu* 221

13. PLEADING—OBJECTIONS TO COMPLAINT—WAIVER—AMENDMENT—ISSUES AND PROOF—VARIANCE. In an action for services rendered, the fact that exhibits referred to in the complaint did not in all particulars coincide with the allegations of the complaint, does not warrant a nonsuit, where there was no demurrer to the complaint nor motion for judgment on the pleadings, which will be considered amended to conform to the proof, if necessary. *Clark v. Cross*.. 231

POLICE POWER:

Of state, see CONSTITUTIONAL LAW, 3, 4.

POLICY:

Of insurance, see INSURANCE.

POOL SELLING:

See GAMING.

POPULATION:

Judicial notice of, see EVIDENCE, 1.

POSSESSION:

See ADVERSE POSSESSION.
Of stolen property in prosecution for burglary, see BURGLARY.
As affecting title to crops, see CROPS.
Of abandoned claim as color of title, see MINES AND MINERALS, 2.

PRACTICE:

See APPEAL AND ERROR; CONTINUANCE; COSTS; CRIMINAL LAW; DISCOVERY; DIVORCE; JUDGMENT; NEW TRIAL; PLEADING; TRIAL.
Procedure of particular courts, see COURTS.

PREFERENCES:

By insolvent corporation, see CORPORATIONS, 5.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 44-60.

PREMEDITATION:

See HOMICIDE, 8.

PRESENTMENT:

Of claim against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2, 4.

PRESUMPTIONS:

Negligence of bailee, see BAILMENT, 1.
As to value of goods converted by carrier, see CARRIERS, 4.
As to condition of goods in possession of connecting carrier, see CARRIERS, 6.
As to jurisdiction on collateral attack, see COURTS.
Upon failure of party to produce evidence, see DISCOVERY, 2.
As to jurisdiction of territorial probate courts, see EXECUTORS AND ADMINISTRATORS, 7.
As to laws of sister state, see SEDUCTION.

PRIMA FACIE CASE:

See MASTER AND SERVANT, 11, 12.

PRIMARY ELECTIONS:

See ELECTIONS.

PRINCIPAL AND AGENT:

See BROKERS.
Master's liability for wrongful acts or commissions of servant, see MASTER AND SERVANT, 25.

1. PRINCIPAL AND AGENT—BROKERS—AUTHORITY TO SELL LAND—VENDOR AND PURCHASER. Findings that a corporation executing a contract of sale as agent for the owner, another corporation, had authority so to do are sustained where it appears that the first corporation was agent for the other for some purposes, that confidential relations existed between the two, and that the owner did not repudiate the contract when informed thereof, but left it to the president of the agent to say whether it should be fulfilled. *Bittrick v. Consolidated Improvement Co.* 469

2. PRINCIPAL AND AGENT—CONTRACTS—AUTHORITY OF AGENT—PLEADING. A complaint in an action upon an assignment of a contract to purchase land, alleged and set out as signed by the defendant, by "R. G. F. his agent," is insufficient to state a cause of action for the money agreed to be paid in consideration of the assignment, when there is no allegation that the agent named was defendant's agent, or that he acted for defendant or had authority or intended to do so. *Lawson v. Sprague*..... 286

PRINCIPAL AND SURETY:

Parol evidence varying contract of suretyship, see EVIDENCE, 5.

PRINTING:

Publication of notices in official newspapers, see NEWSPAPERS.

PRIORITIES:

Of mechanics' liens, see MECHANICS' LIENS, 2, 3.

PRIVATE USE:

As affecting right to condemnation, see EMINENT DOMAIN, 2, 3.

PRIVILEGED COMMUNICATIONS:

Disclosure by witness, see WITNESSES, 3.

PROBATE:

Administration of estate of decedent, see EXECUTORS AND ADMINISTRATORS.

PROCESS:

On appeal, see APPEAL AND ERROR, 17-19.
Foreign corporations, see CORPORATIONS, 11.
In foreclosure of delinquency tax certificate, see TAXATION, 4-6.

1. PROCESS—NONRESIDENT DEFENDANTS—PUBLICATION OF SUMMONS AND GARNISHMENT—ASSIGNMENT OF CLAIMS. The court acquires jurisdiction of nonresident defendants on service of summons by publication and the garnishment of assigned claims, where the assignment was not completed by delivery and acceptance before the issuance of the garnishment. *Nixon v. Hendy Machine Works*.. 419

PROHIBITION:

1. PROHIBITION—TO COURTS—RESTRAINING PROSECUTION—ADEQUATE REMEDY BY APPEAL. Prohibition does not lie to restrain proceedings under an information for seduction which had been stayed by marriage, under Laws 1905, p. 57, on the ground that the law is unconstitutional and that the court erred in refusing to quash the information, since there is an adequate remedy by appeal. *State ex rel. McCalley v. Superior Court*..... 572

PROMISE:

To repair defects in machinery or appliances, see MASTER AND SERVANT, 5-8, 10, 22.

PROOF:

Issues and proof, see PLEADING, 10-13.
Issues and proof in action to quiet title, see QUIETING TITLE, 2.

PROPERTY:

Title to crops, see CROPS.
Adverse possession, see ADVERSE POSSESSION.
Liens for grading and improving property, see AGRICULTURE.
Disposition on divorce, see DIVORCE, 1.
Liability of land not benefited for preliminary cost in establishing drainage district, see DRAINS.

PROPERTY—CONTINUED.
Taking for public use, see EMINENT DOMAIN.
Decision as to estate acquired by spouse in public land as rule of property, see HUSBAND AND WIFE, 3, 4.

PUBLICATION:
In official newspapers, see NEWSPAPERS.
Service of process, see PROCESS.
Of summons in foreclosure proceedings, see TAXATION, 4-6.

PUBLIC IMPROVEMENTS:
By cities, see MUNICIPAL CORPORATIONS, 1-10.

PUBLIC LANDS:
Acquisition by adverse possession, see ADVERSE POSSESSION, 1.
Recovery of lands claimed under title from government, see EJECTMENT.
Right of way over public lands, see HIGHWAYS.
Interests in, as separate or community property, see HUSBAND AND WIFE, 3, 4.
Indian lands, see INDIANS.
Conclusiveness of decision against husband in land department, see JUDGMENT, 8.
Mineral lands, see MINES AND MINERALS.
Ownership of tide lands as defense in action for obstructing river, see NAVIGABLE WATERS, 3.

1. PUBLIC LANDS—DONATION CLAIM—ABANDONMENT—RAILROAD GRANT. A portion of a donation land claim, originally settled upon, is part of the public domain and is not reserved from a railroad grant, where it was not included in the Surveyor General's subsequent survey, and had been abandoned by the settler, who in lieu thereof acquired title to the claim as surveyed. *Northern Pac. R. Co. v. George*..... 303

2. PUBLIC LANDS — SETTLERS — RIGHT OF OCCUPANCY — UNSURVEYED LAND—STATUTES—CONSTRUCTION. Vol. 23, Stat. 321, prohibiting the unlawful occupancy of the public domain was not intended to prevent actual *bona fide* settlers from enclosing an entryman's proportion of unsurveyed land. *McAllister v. Okanogan County*..... 647

3. SAME—EMINENT DOMAIN. A *bona fide* settler in peaceable possession of an entryman's proportion of unsurveyed public lands, who had enclosed the lands and made improvements, has such an interest in the lands as to preclude the opening of a county road across the same without condemning his interests. *McAllister v. Okanogan County* 647

4. PUBLIC LANDS—SETTLEMENT—RIGHTS CONFERRED—HUSBAND AND WIFE. Settlement on government land by husband and wife confers no community interest. *Delacey v. Commercial Trust Co.* 542

PUBLIC LANDS—CONTINUED.

5. SAME—ADVERSE POSSESSION—LIMITATIONS. An entryman on public lands cannot, pending a contest, set the statute of limitations in motion by claiming adverse possession. *Delacey v. Commercial Trust Co.* 542

6. SAME—CONTESTS—JUDGMENT—PARTIES CONCLUDED—WIFE OF ENTRYMAN. The wife of an entryman, who makes settlement on public land with him, is in privity with her husband as to a contest waged by him before the land department for the issuance of a patent; and upon the deciding of the contest against the entryman and his abandonment of the property, the wife, continuing to hold possession, does not hold under color of title or claim of right. *Delacey v. Commercial Trust Co.* 542

PUBLIC SCHOOLS:

See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

QUESTION FOR JURY:

In action against bailee for loss of money, see BAILMENT, 4.
In prosecution for burglary, see BURGLARY.
Negligence of carrier in action for death of intoxicated passenger, see CARRIERS, 13.
Negligence in landing passenger from boat, see CARRIERS, 14.
Existence and breach of contract to forward goods, see CONTRACTS, 2.
Compliance of party with subpœna *duces tecum*, see DISCOVERY, 2.
In action by servant for injuries, see MASTER AND SERVANT, 6, 8, 18, 21-23.
In action by vendee for damages for nondelivery of railroad ties, see SALES, 3.
Previous chaste character of plaintiff, see SEDUCTION, 3.
Sufficiency of tender, see TENDER, 3.
In civil actions in general, see TRIAL, 7, 8.

QUIETING TITLE:

Action as collateral attack on probate proceedings, see JUDGMENT, 6.
To mining claim, see MINES AND MINERALS, 5.

1. QUIETING TITLE—PERSONS ENTITLED. Where neither husband nor wife had any beneficial interest in property purchased in the name of the wife and by her conveyed to the owner, such owner's title should be quieted, as against plaintiffs claiming as heirs of the wife. *Dodds v. Dodds*..... 293

2. QUIETING TITLE—PLEADINGS—ISSUES AND PROOF—ACTIONS—RELIEF UNDER CROSS COMPLAINT—VARIANCE. Where a complaint by a wife for separate maintenance or a partition of real property is dismissed, and the cause is tried on the husband's cross-complaint

QUIETING TITLE—CONTINUED.
seeking to quiet his title to separate property, a personal judgment against the husband is outside of the issues, there being nothing in the cross-complaint or reply to warrant it; and it is error to award the plaintiff affirmative relief. *Loeper v. Loeper*..... 682

RAILROADS:
Carriage of goods and passengers, see CARRIERS.
Injuries to passengers on street car, see CARRIERS, 7, 8, 10-13.
Contract to build new road as violation of prohibition against consolidation of competing lines, see COMMERCE.
Exercise of power of eminent domain, see EMINENT DOMAIN, 4.
Injuries to employees, see MASTER AND SERVANT, 5, 6.
Grant of right of way through public lands, see PUBLIC LANDS, 1.

RAPE:
Denial of new trial as abuse of discretion, see CRIMINAL LAW, 4.

RATIFICATION:
Of broker's acts as between principal and broker, see BROKERS, 2.

REAL ESTATE AGENTS:
See BROKERS.

REAL PROPERTY:
Sale of real estate of decedent to pay claims, see EXECUTORS AND ADMINISTRATORS, 5-7.
Trespass on real property, see TRESPASS.
Sale of land, see VENDOR AND PURCHASER.

REBUTTAL:
Calling adverse party, see WITNESSES, 1.

RECEIVERS:
Appointment in action by minority stockholders for fraud, see CORPORATIONS, 7.
In foreclosure proceedings, see MORTGAGES, 5, 6.
Appointment of in action to enforce lien for damages to bridge by vessel, see SHIPPING.

RECORDING:
Of chattel mortgages, see CHATTEL MORTGAGES.

RECORDS:
Transcript on appeal or writ of error, see APPEAL AND ERROR, 20-27
Files and records of cause as evidence of value of services, see ATTORNEY AND CLIENT, 2.
As evidence of cause of death, see DEATH, 1.

REFUNDING:
Of tax paid, see TAXATION, 1-3.

RELEASE:

Subletting and acceptance of rent as release of original lessee, see LANDLORD AND TENANT, 1, 2.

RELIANCE:

On promise to repair defects in machinery or appliances, see MASTER AND SERVANT, 6, 8, 22.

RELOCATION:

Of mining claims, see MINES AND MINERALS, 2, 5.

RENT:

See LANDLORD AND TENANT.

REPAIRS:

Promise to repair defects in machinery or appliances, see MASTER AND SERVANT, 5-8, 10, 22.

Mechanics' lien for, see MECHANICS' LIENS, 2.

Evidence of necessity of repairs by city in action for personal injuries, see MUNICIPAL CORPORATIONS, 18.

REPEAL:

Implied repeal of act authorizing appointment of receiver for mortgaged property, see MORTGAGES, 6.

Implied repeal of act relating to management of funds of State College, see STATES.

Of statute, see STATUTES, 5.

REPLEVIN:

1. REPLEVIN—EVIDENCE—RELEVANCY. In replevin of a horse, where plaintiff has testified positively that his son had no authority to sell the horse but had possession only for the purpose of working it, questions on cross-examination as to what plaintiff's son was to do with the money, or if he would have been satisfied if the son had mortgaged the horse, and the like, are properly excluded as irrelevant and immaterial. *Warehime v. Schweitzer*..... 299

REPLY:

In pleadings, see PLEADING, 4-6.

REQUESTS:

For instructions in civil actions, see TRIAL, 14-16.

RESCISSION:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Of contract for sale of goods, see SALES, 1, 2.

Of contract for sale of land, see VENDOR AND PURCHASER, 1-6.

RESERVATION:

In deeds, see DEEDS, 4.

Of public land from railroad grant, see PUBLIC LANDS, 1.

RESIDENCE:

Statement of in claim for injuries filed with city, see MUNICIPAL CORPORATIONS, 24-26.

RES IPSA LOQUITUR:

See MASTER AND SERVANT, 11, 12.

RES JUDICATA:

See JUDGMENT, 6-9.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 61, 62.

RESTRICTIONS:

On right of alienation, see INDIANS.

REVENUE:

See TAXATION.

REVIEW:

By higher court on appeal for errors or irregularities, see APPEAL AND ERROR.

In criminal prosecution, see CRIMINAL LAW, 8, 9.

Power to review orders in same court for error of law, see JUDGMENT, 3, 5.

Proceeding for assessment of property for local improvement, see MUNICIPAL CORPORATIONS, 7-10.

RIPARIAN RIGHTS:

See NAVIGABLE WATERS, 2, 3, 6.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 4, 5, 7, 10, 20-23.

ROADS:

See HIGHWAYS.

Defects in streets or sidewalks causing injuries, see MUNICIPAL CORPORATIONS, 11-27.

SAFE PLACE TO WORK:

Evidence of negligence in furnishing safe place, see MASTER AND SERVANT, 18.

SALARY:

Action by officer for salary and discharge from employment, see CORPORATIONS, 2.

Recovery for wrongful discharge, mitigation of damages, see WORK AND LABOR.

SALES:

By executor or administrator, see EXECUTORS AND ADMINISTRATORS, 5-7.

Authority of agent to sell, see PRINCIPAL AND AGENT.

Tax sales, see TAXATION, 4-6.

Of real property, see VENDOR AND PURCHASER.

1. SALES—RESCISSION BY VENDEE—BREACH OF WARRANTY. The rule that an executed contract of sale cannot be rescinded for breach of warranty does not obtain where the warranty was fraudulently and deceitfully made. *Baker v. Robbins* 467

2. SALES—RESCISSION BY VENDEE—FRAUD—WAIVER. The purchaser of a horse does not waive his right to rescind the sale for fraud by use of the horse after attempted rescission, where such use was merely to give necessary exercise and keep the horse in condition. *Baker v. Robbins* 467

3. SALES—DELIVERY—CASH PAYMENT—BREACH — VENDEE'S INABILITY TO PAY CASH—ACTION BY VENDEE—QUESTIONS FOR JURY. Upon a sale of ties to be delivered "to ship's tackle along the Columbia river," the terms of payment being "cash on presentation of bill of lading, inspection certificate and invoice" at a certain bank in Portland, which suspended business, the purchaser cannot maintain an action for damages for nondelivery, where it was not prepared to pay cash; and such fact is a question for the jury, where it appears that the vendor engaged a tug to take the ties to the vessel, ascertained that no funds were at the bank for payment, and by telegraph refused delivery until arrangements for cash payment had been made, and vendors answered by telegraph that arrangements for cash payment through Portland banks had not been made and proposed to pay by a ten day's sight draft. *McCormick v. Tappendorf* 312

SCHOOL FUNDS:

See SCHOOLS AND SCHOOL DISTRICTS.

SCHOOLS AND SCHOOL DISTRICTS:

Acquisition of school lands by adverse possession, see ADVERSE POSSESSION, 1.

1. SCHOOLS AND SCHOOL DISTRICTS—COMMON SCHOOLS. A common school, within Const., art. 9, § 2, means one that is common to all children of proper age and capacity, free, and subject to, and under the control of the qualified voters of the district. *School District v. Bryan* 498

2. SAME — FUNDS — APPORTIONMENT—COMMON SCHOOLS—STATE NORMAL TRAINING DEPARTMENT. Under the constitutional and statutory provisions differentiating between the common school and the normal school, a model training department of a state normal school wherein a portion of the school children in a district are given instruction which they would otherwise receive in the district schools,

SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.

is not a part of the common schools of the state, within Const., art. 9, § 2, requiring the common school fund to be applied exclusively to the support of the common schools; as such a department is not under the control of the districts or common to all children of proper age or a part of our uniform system of schools, and its main purpose is to benefit the normal pupil; hence Laws 1907, p. 180, § 4, apportioning part of the common school fund of a district to the maintenance of such a model training school is void. *School District v. Bryan* 498

SEDUCTION:

Restraining prosecution under information stayed by marriage, see PROHIBITION.

1. SEDUCTION—ACTION FOR DAMAGES — STATUTES — EXTRATERRITORIAL EFFECT—EVIDENCE—PRESUMPTION AS TO LAWS OF SISTER STATE. Bal. Code, § 4831, providing that an action for seduction may be maintained by an unmarried female authorizes a suit in this state for a seduction committed in another state or territory, in the absence of allegation as to the laws of the sister state, the presumption being that they are the same as the laws of this state. *Murrilla v. Guis* 93

2. SAME—INDUCEMENTS—EVIDENCE — SUFFICIENCY. The evidence is sufficient to show a *prima facie* case of seduction, where, although the plaintiff's evidence showed a case of rape in the first instance, she consented to the continuation of relations for several months, on the promise of the defendant to protect her and by reason of her frame of mind produced by the first ravishment. *Murrilla v. Guis* 93

3. SAME—PREVIOUS CHASTE CHARACTER OF PLAINTIFF — WEIGHT OF EVIDENCE—QUESTION FOR JURY. In an action for the seduction of an actress, employed in a dance hall and saloon to sell liquor and entertain customers, the previous chaste character of the plaintiff and the weight of her evidence, as against that of the defendant, who admitted that he was one of the proprietors of the place and that the same was a house of ill-fame, is for the jury. *Murrilla v. Guis* 93

SERVANTS:

See MASTER AND SERVANT.

SERVICE:

Of process, see PROCESS.

SET-OFF AND COUNTERCLAIM:

For injuries to abutting property by street improvements, see MUNICIPAL CORPORATIONS, 2, 3.

SET-OFF AND COUNTERCLAIM—CONTINUED.

1. SET-OFF AND COUNTERCLAIM—TENDER—AS BAR—PLEADING. A tender by defendant of a sum admitted to be due on a contract involving items that can be segregated does not bar a counterclaim for a larger sum arising out of the same transaction, Bal. Code, § 5176, only requiring a tender of the amount admitted to be due. *LaRault v. Palmer* 664

SETTLEMENT:

Of bill of exceptions or statement of facts, see APPEAL AND ERROR, 26, 29.

SETTLERS:

Possessory rights on unsurveyed lands sought to be appropriated for highway, see HIGHWAYS.

On public lands, see PUBLIC LANDS.

SHIPPING:

Admiralty jurisdiction to enforce remedy for maritime torts, see ADMIRALTY.

Injuries to passenger in landing from boat, see CARRIERS, 9, 14.

Master's liability for injuries to servant from unsafe appliances and places to work, see MASTER AND SERVANT, 2-4, 16, 17, 20.

Fellow servants in shipping, see MASTER AND SERVANT, 3.

1. SHIPPING—LIENS—TORTS BY VESSEL—DAMAGE TO BRIDGE. Bal. Code, § 5953, providing for liens on a vessel for injuries committed by it to persons or property, gives a lien for damages by a vessel to the pier of a bridge. *West v. Martin*..... 85

2. SAME—COURTS—JURISDICTION—STATE LIENS ON VESSELS. The state courts have jurisdiction to enforce a lien given by state laws for damages done by vessels, where the admiralty courts are without jurisdiction. *West v. Martin*..... 85

3. SAME—LIENS—AGAINST VESSEL — ATTACHMENT — ENFORCEMENT — RECEIVERS—JURISDICTION—BOND FOR RELEASE—EFFECT. In an action to enforce a lien given by a state law upon a vessel for damages, the appointment of a receiver for the vessel is the equivalent of an attachment and the proceeding is *in rem;* and upon the defendants' giving a bond for the release of the vessel, the regularity of the attachment cannot be questioned. *West v. Martin*..... 85

4. SAME—DAMAGES—INJURY BY VESSEL. The measure of damages for injury by a vessel to a pier and portion of a bridge is the actual cost of repairing it, and a reasonable sum as the net profits of the bridge during the time it could not be used. *West v. Martin*... 85

SOLVENCY:

Adjudication of solvency in case of nonintervention wills, see EXECUTORS AND ADMINISTRATORS, 4.

SPECIFIC PERFORMANCE:

Of corporate contracts, see CORPORATIONS, 1, 3.

1. SPECIFIC PERFORMANCE—PARTIES ENTITLED—INTEREST IN SUBJECT-MATTER. An action for specific performance of a contract to convey land may be maintained by a vendee who has contracted to sell the land to another and is obligated to deliver good title. *Bittrick v. Consolidated Improvement Co.* 469

2. SPECIFIC PERFORMANCE — EQUITY — LACHES — DELAY IN BRINGING SUIT. A delay of two or three months in bringing action for specific performance of a contract to convey land does not amount to laches barring the suit, where the value of the property is not uncertain and fluctuating. *Tacoma Water Supply Co. v. Dumermuth*..... 609

STARE DECISIS:

Rule of decision on appeal, see APPEAL AND ERROR, 61, 62.

Rule of property as to interest acquired by spouse in public lands, see HUSBAND AND WIFE, 3, 4.

STATE COLLEGE:

Management and control of funds, see STATES.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 22-27.

Of plaintiff's claim, see PLEADING, 1.

STATES:

State institutions, see COLLEGES AND UNIVERSITIES.

Legislative power, see CONSTITUTIONAL LAW.

Apportionment of school funds, see SCHOOLS AND SCHOOL DISTRICTS.

Jurisdiction of state courts to enforce lien for damage to bridge by vessel, see SHIPPING.

1. STATES—FISCAL MANAGEMENT—FUNDS OF STATE COLLEGE — PAYMENT TO STATE TREASURER—STATUTES—CONSTRUCTION—IMPLIED REPEAL—GENERAL AND SPECIAL ACTS. Moneys received by the treasurer of the board of regents of the State College from students' fees and rents and sources other than the general and state government are not a part of the "State finances" to be paid over by him to the state treasurer, within the meaning of the act of 1907, p. 179, entitled "an act relative to the finances of the state....," which provides that each state officer or other person authorized to collect moneys belonging to the state or any institution thereof shall each day transmit all moneys to the state treasurer, although such college is a state institution; and the prior laws, making it the duty of the treasurer to collect and disburse such moneys, are not impliedly repealed by the act of 1907, p. 179; since repeals by implication are not favored, and special acts are not presumed to be repealed by a general act; considering also the subsequent act of 1907, p. 423, directing the treasurer of the board of regents to receive the annual appropriation of the general government for experiment stations. *State ex rel. Johnson v. Clausen*..... 548

STATUTES:

Delegation of legislative and judicial powers, see CONSTITUTIONAL LAW, 1, 2.
Granting special privileges or immunities, see CONSTITUTIONAL LAW, 4.
Act preventing duplication of corporate names, see CORPORATIONS, 9.
Disqualification of candidate by publication in newspaper, see ELECTIONS.
Delegation of power of eminent domain, see EMINENT DOMAIN, 1.
Conviction of offense of pool selling under statute defining gambling, see GAMING.
Grants of right of way over public lands, time of taking effect, see HIGHWAYS.
Sufficiency of information charging murder, see HOMICIDE, 1, 2.
Statutes of limitation, see LIMITATION OF ACTIONS.
Costs on enforcement of logger's lien, see LOGS AND LOGGING.
Appointment of receiver for mortgaged property, implied repeal, see MORTGAGES, 6.
Advertisement by physician without first securing license, see PHYSICIANS AND SURGEONS.
Right of settlers under act prohibiting unlawful occupancy of public domain, see PUBLIC LANDS, 2.
Diversion of common school fund, see SCHOOLS AND SCHOOL DISTRICTS.
Extraterritorial effect of law authorizing action by female, see SEDUCTION.
Fiscal management, public debt, and securities of state, see STATES.
Requiring written instructions to jury, see TRIAL, 10-11.
Laws governing wills, see WILLS.

1. STATUTES—TITLE AND SUBJECTS—AMENDMENTS. Laws 1903, p. 90, relating to drainage districts, does not violate Const., art. 2, § 37, providing that no act shall be revised or amended without setting out the same in full, since the same is a complete law of procedure within itself. *Northern Pac. R. Co. v. Pierce County*..... 12

2. STATUTES—SUBJECTS AND TITLES — AMENDMENTS — LIMITATION OF ACTIONS. Laws 1903, p. 26, being an act relating to limitations in actions brought by the state and municipalities amending Bal. Code, § 4807, is not broad enough to embrace the provision of § 4807 that an action shall be deemed commenced when the complaint is filed. *Blalock v. Condon*..... 604

3. SAME. The title of an amendatory act referring to the act amended merely by its number is not sufficient. *Blalock v. Condon* 604

4. STATUTES—TITLE AND SUBJECTS—SUFFICIENCY. The title to an act to regulate the practice of medicine and surgery is sufficiently broad to include provisions making it unlawful for an unlicensed person to call or advertise himself as "Physician" or "Doctor." *State v. Pollman*..... 110

STATUTES—CONTINUED.

5. SAME—REPEALS—IMPLIED REPEALS—LIMITATION OF ACTIONS. Laws 1903, p. 26, entitled an act relating to limitations in actions brought by the state and municipalities, amending Bal. Code, § 4807, without reference to a repeal of other statutes, and containing no repealing clause, does not repeal by implication that part of § 4807 which provides that an action is deemed commenced when the complaint is filed. *Blalock v. Condon*..... 604

STENOGRAPHERS:

Report as "instructions in writing," see TRIAL, 10, 11.

STEVEDORES:

Liability of master in employing incompetent coservant, see MASTER AND SERVANT, 2.

STOCK:

Corporate stock, see CORPORATIONS.

Validity of subscription by trustee to confer right of eminent domain on railway, see EMINENT DOMAIN, 4.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 1, 7.

STOLEN GOODS:

Conversion, see TROVER AND CONVERSION.

STREET RAILROADS:

Injuries to passengers, see CARRIERS, 7, 8, 10-13.

STREETS:

Defects or obstructions causing injuries, see MUNICIPAL CORPORATIONS, 11-27.

SUBLETTING:

Of lease, see LANDLORD AND TENANT, 1.

SUBPOENA DUCES TECUM:

Presumption on failure to produce papers, see DISCOVERY, 2.

SUBROGATION:

Of mortgagee to right of lien for taxes, see TAXATION, 2.

SUBSCRIPTION:

To corporate stock, see CORPORATIONS, 1.

To stock of railway by trustee as conferring right of eminent domain, see EMINENT DOMAIN, 4.

SUBSTITUTION:

Of authority by member of firm, see ATTORNEY AND CLIENT, 1.

Acceptance of rent from subtenant as release of original lessee, see LANDLORD AND TENANT, 2.

SUMMONS:

Service on agent of foreign corporation, see CORPORATIONS, 11.
On nonresident, see PROCESS.
Name of owner in publication of, see TAXATION, 4-6.

SUPPORT:

Of children on divorce, see DIVORCE, 1, 4, 5.

SURGEONS:

See PHYSICIANS AND SURGEONS.

SURPRISE:

See NEW TRIAL, 3.

TAXATION:

Time for taking appeal from judgment in action to vacate tax judgment and sale, see APPEAL AND ERROR, 17.
By drainage districts, see DRAINS.
Recovery of taxes in action of unlawful detainer, see LANDLORD AND TENANT, 4.
Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 1-10.

1. TAXATION—RIGHTS OF MORTGAGEE—EQUITABLE LIEN—PAYMENT OF TAXES. A mortgagee whose mortgage is outlawed has an equitable lien for taxes and special assessments paid by him in good faith under the belief that his mortgage was valid; and the same is not a voluntary payment when made for the purpose of protecting the mortgage lien. *Childs v. Smith*..... 457
2. SAME—LIMITATION OF ACTIONS—LIEN FOR TAXES—SUBROGATION. The equitable lien of a mortgagee for general taxes paid in good faith is not barred by the statute of limitations, since the statute could not be set up against the county or state, to whose rights the mortgagee is subrogated; the statute providing that taxes are a lien until paid. *Childs v. Smith*..... 457
3. SAME—LIEN FOR SPECIAL ASSESSMENTS—MUNICIPAL CORPORATIONS. The equitable lien of a mortgagee for the amount of special assessments paid in good faith is barred by the lapse of ten years after the date of delinquency of the assessments; since the rights of the city to enforce the assessments are barred at that time, and the mortgagee is simply subrogated thereto. *Childs v. Smith*..... 457
4. TAXATION—TAX TITLE — PROCESS — NAME OF DEFENDANT — IDEM SONANS. The misnaming in a tax foreclosure summons of Minnie E. Tiller, the owner, as Minnie E. Tilter is not ground for setting aside the tax title, as the same comes within the rule of *idem sonans*. *Kelly v. Kuhnhausen*..... 193
5. TAXATION—FORECLOSURE — SUMMONS BY PUBLICATION — NAME OF OWNER. Under Laws, 1901, p. 383, § 1, providing that the holder of a tax delinquency may give notice to the "owner of the property

TAXATION—CONTINUED.

described in the certificate," and Id., § 3, providing that the names of the persons appearing on the assessment rolls as the owners of said property shall be considered the owners thereof, notice of foreclosure must be given to the actual owner or the owner described on the rolls, and not to the person erroneously named in the certificate of delinquency as the owner; hence where the property of John E. Carney was assessed on the rolls to J. E. Carney, and the certificate named J. G. Carney, the summons by publication was issued in the latter name, and the owner was misled and had no actual notice of the suit, the tax foreclosure and deed is void. *Carney v. Bigham* 452

6. SAME—NAMES—MIDDLE INITIAL. A tax foreclosure of the property of John E. Carney, on publication of a summons against John G. Carney, cannot be sustained on the theory that the middle initial is no part of a person's name. *Carney v. Bigham*..... 452

TENDER:

Allowance of interest after tender of purchase money, see INTEREST.
Of overdue interest as affecting right to declare debt due, see MORTGAGES, 3.
As bar to counterclaim, see SET-OFF AND COUNTERCLAIM.
Of conveyance by vendor of land, see VENDOR AND PURCHASER, 2.
Of purchase price for land, see VENDOR AND PURCHASER, 8, 9.

1. TENDER—NECESSITY. A formal tender is excused where it appears that it would be refused. *Weinberg v. Naher*..... 591
2. TENDER—CONDITIONS—WAIVER OF OBJECTIONS. Where at the time a tender of interest was made through a payment to a bank, coupled with a request that the mortgagee call and receive it, the mortgagee, in writing, gave as his only reason for refusing the tender, that the interest was past due, he cannot afterwards object that the tender was not lawful because coupled with a condition and not made to him personally. *Weinberg v. Naher*..... 591
3. TENDER—EVIDENCE—QUESTION FOR JURY. The sufficiency of a tender is for the jury, where there was evidence of an informal tender from which the jury might well conclude that a more formal tender would be vain and useless. *Baker v. Robbins*..... 467

TESTAMENT:

See WILLS.

THREATS:

As evidence in prosecution for murder, see HOMICIDE, 6.

TIMBER:

Cutting and floating of logs, see LOGS AND LOGGING.

TIME:

For taking appeal or suing out writ of error, see APPEAL AND ERROR, 17.
For filing case or statement of facts on appeal, see APPEAL AND ERROR, 25.
For filing briefs, see APPEAL AND ERROR, 29, 30.
For performance of contract, see CONTRACTS, 1.
For filing and tendering nominations for certification, see ELECTIONS, 2.
For presentation of claims against decedent's estates, see EXECUTORS AND ADMINISTRATORS, 2, 4.
Claim of exemption, see EXEMPTIONS.
Computation of period of limitation, see LIMITATION OF ACTIONS.
Reliance on promise to repair defects, see MASTER AND SERVANT, 8.
For foreclosure of mortgage, see MORTGAGES, 4.
For performance by plaintiff in suit for specific performance, see SPECIFIC PERFORMANCE, 2.
Laws in force at date of testator's death as controlling will, see WILLS.

TITLE:

Acquisition of school lands by adverse possession, see ADVERSE POSSESSION, 1.
Bond to assure title to land purchased, see BONDS.
To crops, see CROPS.
To maintain ejectment, see EJECTMENT.
Of grantee to land mortgaged by donor, see ESCROWS, 3.
Nature of estate acquired by married man under timber and stone act, see HUSBAND AND WIFE, 3, 4.
To mines, see MINES AND MINERALS.
Of entryman on public lands, see PUBLIC LANDS, 3.
Removal of cloud, see QUIETING TITLE.
Of statutes, see STATUTES.
Sufficiency of title of vendor of land, see VENDOR AND PURCHASER, 9.

TORTS:

See NEGLIGENCE; TROVER AND CONVERSION.
Jurisdiction in admiralty, see ADMIRALTY.
In carriage of passengers, see CARRIERS, 7-14.
Damages, inadequate or excessive, see DAMAGES, 3-5.
Causing death, see DEATH.
Judgment in favor of one or more codefendants, see JUDGMENT, 1.
Injuries by employees, see MASTER AND SERVANT, 25, 26.
Of cities, see MUNICIPAL CORPORATIONS.
Damage to bridge by vessel, see SHIPPING.

TRADE:

Agreement in restraint of trade, see COMMERCE.

TRADE-MARKS AND TRADE-NAMES:

1. TRADE-MARKS AND TRADE-NAMES—INJUNCTIONS—ENJOINING USE OF NAME FOR HOTEL. The keepers of a small hotel used principally as a rooming house by the week, called the Hotel St. Francis, are entitled to an injunction preventing the use of the same name for a large hotel catering principally to transients by the day, where it appears that the two hotels are in the same locality, both competing for transient trade, and that confusion results from the use of the same name; and it is immaterial that the defendant when it adopted the name had no knowledge of the prior use thereof by the plaintiffs and had no intent to deceive or defraud, or that it is more inconvenienced by the confusion than the plaintiffs, or the public. *Martell v. St. Francis Hotel Co.* 375

2. SAME—DEFENSES. In such a case, it is no defense that the plaintiff purchased their hotel and its good will pending the litigation, when all prior damages were waived. *Martell v. St. Francis Hotel Co.* 375

TRESPASS:

1. TRESPASS—VOLUNTARY—EVIDENCE—SUFFICIENCY. A finding that a trespass was not casual or involuntary is supported where defendants cut trees without having made an effort to locate section lines, which were easily located after the trespass. *Nethery v. Nelson* 624

2. TRESPASS—DAMAGES—EXCESSIVE VERDICT. A verdict for $974.19 for trespass in cutting trees is excessive where the testimony most favorable to the plaintiff showed the cutting of forty-seven trees of the stumpage value of $785.74, and the testimony that standing timber left was rendered less valuable was outside the issues, and there was no testimony as to the extent of depreciation of the value of standing timber or of the land. *Nethery v. Nelson* 624

3. SAME—DAMAGES. Evidence that 250,000 to 390,000 feet of timber cut was of the value of from $1 to $2 per thousand should not warrant a finding that the fair value of the timber was over $500. *Nethery v. Nelson* 624

TRIAL:

Review of rulings as dependent upon presentation of objection in lower court, see APPEAL AND ERROR, 6-9.

Review of rulings as dependent on exception in lower court, see APPEAL AND ERROR, 11-16.

Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 20-24.

Review as dependent on specifications in assignment of errors, see APPEAL AND ERROR, 28.

Review of rulings involving discretion of court, see APPEAL AND ERROR, 36, 37.

TRIAL—CONTINUED.
Review of findings in trial by court, see APPEAL AND ERROR, 42, 43.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 44-60.
Error in exclusion of evidence cured by subsequent admission or instructions to jury, see APPEAL AND ERROR, 54-58.
Instructions in action to recover for services, see ATTORNEY AND CLIENT, 1.
Instructions in action for conversion of goods, see CARRIERS, 1.
Instructions in action for injuries to passengers, see CARRIERS, 7.
Continuance in civil actions, see CONTINUANCE.
In criminal prosecutions, see CRIMINAL LAW.
Instructions as to damages for impairment of earning capacity, see DAMAGES, 2.
Instructions in prosecution for murder, see HOMICIDE, 8.
Instructions in action on insurance policies, see INSURANCE, 3-5.
Effect of direction of verdict in favor of one joint tort feasor, see JUDGMENT, 1.
Judgment of dismissal as *res adjudicata*, see JUDGMENT, 7.
Instructions in action for personal injuries, see MASTER AND SERVANT, 24.
Instruction as to damages in action for wrongful maintenance of boom in river, see NAVIGABLE WATERS, 7, 8.
Instructions as to negligence of infant in exploding dynamite cap, see NEGLIGENCE.
Motions and grounds for new trial, see NEW TRIAL.
Agreed statement of facts as showing failure to pay for party wall, see PARTY WALLS.
Evidence admissible under pleading, see PLEADING, 10, 11.
Objections on ground of variance, see PLEADING, 13.
Relevancy of evidence on cross-examination, see REPLEVIN.
Attendance and examination of witnesses, see WITNESSES.

1. TRIAL—OBJECTIONS TO EVIDENCE. A stipulation at a trial that exceptions shall be considered taken to all adverse rulings, does not obviate the necessity of necessary objections at proper times. *State v. Bridgham* 18

2. TRIAL—EVIDENCE—OBJECTIONS—SUFFICIENCY. An objection to a coroner's record of an inquest because it was not complete does not raise the question of its relevancy or materiality. *State v. Bridgham* 18

3. TRIAL—ARGUMENT OF COUNSEL—REPLY. It is not prejudicial error to fail to restrict the reply argument of counsel to matters already commented on, where the court in ruling upon the objection stated that if the rules were transgressed he would give an opportunity to reply, and no request was made for leave to answer. *Thomas v. Fox* 250

TRIAL—CONTINUED.

4. TRIAL—MISCONDUCT OF COUNSEL. Evidence that a new walk had been laid, since an accident on a defective sidewalk, is not shown to have been deliberately planned to prejudice the jury by a remark of counsel that they expected to ask to have it struck out, where it was brought out incidentally on cross-examination. *Billings v. Snohomish* 135

5. TRIAL—MISCONDUCT OF COUNSEL. Reading evidence introduced at a former trial in the argument to the jury is improper unless it was offered in evidence. *Sullivan v. Seattle Electric Co.* 71

6. SAME. In an action for negligently causing the death of an intoxicated person, it is improper for counsel for the plaintiffs to comment to the jury upon the absence of evidence that the deceased was a drunkard. *Sullivan v. Seattle Electric Co.* 71

7. TRIAL—NEW TRIAL—PROVINCE OF COURT AND JURY. If the trial court considers the evidence was insufficient to sustain a verdict for the plaintiff, it may grant a new trial, but it cannot for such reason direct a verdict for the defendant, if the evidence is conflicting. *Messir v. McLean* 140

8. TRIAL—PROVINCE OF JURY. The determination of the preponderance of conflicting evidence is for the jury, and not the appellate court. *Morgan v. Rainier Beach Lumber Co.* 335

9. TRIAL—INSTRUCTIONS—ASSUMPTION AS TO FACTS. It is not error in instructions to the jury to refer to one of the parties to the action as a "lady." *McKay v. Anderson Steamboat Co.* 679

10-11. TRIAL — INSTRUCTIONS — NECESSITY OF WRITTEN INSTRUCTIONS. Where a stenographic report of instructions to the jury is made by a stenographer employed by both parties, he is sufficiently under the control of the court to constitute his report "instructions in writing," within the meaning of Laws 1903, p. 119, § 1, requiring written instructions upon demand, provided that a stenographic report of the charge shall be considered a charge in writing (Overruling *McIntosh v. Sawmill Phoenix*, 49 Wash. 152.). *Schon v. Modern Woodmen of America* 482

Sturgeon v. Tacoma Eastern R. Co. 124

12. TRIAL—INSTRUCTIONS—TESTIMONY AND EVIDENCE. It is not a valid objection to instructions that the word "testimony" was used in place of the word "evidence." *Jones v. Seattle* 245

13. TRIAL—INSTRUCTIONS—RELEVANCY—TRESPASS—ISSUES AND PROOF. In an action for trespass alleged to have been committed without the knowledge or consent and against the will of the plaintiffs, in which the defendant justified the acts as done pursuant to a written contract with plaintiffs, it is prejudicial error, requiring a new trial, to give an instruction to the jury to the effect that, if the contract was established, the plaintiffs could not recover unless the jury find that acts negligently and carelessly performed caused the dam-

TRIAL—CONTINUED.

age, there being no evidence or issue as to any negligence of the defendant, and a direct conflict in the testimony making the right of recovery doubtful. *Buyken v. Lewis Construction Co.* 627

14. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse instructions covered in the general charge. *Duskey v. Green Lake Shingle Co.* 145

15. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse instructions covered in the general charge. *Pearson v. Alaska Pacific Steamship Co.* 560

16. TRIAL—INSTRUCTIONS. Error cannot be predicated upon the refusal to give instructions in any particular language where the jury were properly instructed. *Akin v. Bradley Engineering & Machinery Co.* 658

TROVER AND CONVERSION:

Conversion by bailee, see BAILMENT.

Failure of carrier to deliver goods to consignee, see CARRIERS, 1, 3, 4.

1. TROVER AND CONVERSION—EVIDENCE OF TAKING MONEY—SUFFICIENCY. In an action to recover money alleged to have been stolen by defendants, there is sufficient evidence of the taking and it is error to grant a nonsuit, where it appears that a large sum of money was in a tin box concealed in the house of the plaintiff, whose husband was away from home, that defendants and a third person helped to extinguish a fire in the house at night, and were the only persons in the house or who had an opportunity to take the money, that defendants knew of the money in the house, one of them was in the house alone for a short time, and was met coming away with his hand held behind his back, and a key to the box was afterwards found in his house, other testimony casting suspicion on the defendants and excluding all probability that the third person took the money. *Galler v. McMahon*..... 473

2. TROVER AND CONVERSION—CONTRACTS—VENDOR AND PURCHASER—REMOVAL OF BUILDING—LIABILITY. One is liable for a conversion where he was under contract to purchase land and made improvements converting a barn into a dwelling, and pending efforts to perfect title removed the same and refused to pay therefor or buy the land after the title was perfected. *Twitchell v. Benjamin*..... 143

3. SAME—DEFENSES—CONSENT TO REMOVAL. In such a case it is no defense that the vendor consented to the removal of the barn, not intending a gift; as there arose an implied promise to pay its value. *Twitchell v. Benjamin*..... 143

TRUSTEES:

Subscription to stock by trustee of other railway as sufficient to confer right of eminent domain, see EMINENT DOMAIN, 4.

TRUSTS:

Laches as bar to assert interest in land, see EQUITY.

1. TRUSTS—EXPRESS OR RESULTING TRUSTS—ORAL EVIDENCE TO ESTABLISH. An absolute deed for the expressed consideration of one dollar, made to a third person by mortgagors pending foreclosure, under an oral agreement by the grantee to advance the money to redeem from the mortgage and to hold the land in trust for the use of one of the mortgagors until the sum advanced is repaid, is an express and not a resulting trust, and oral evidence is inadmissible to establish the same, under Bal. Code, § 4517, requiring contracts creating an incumbrance on real property to be by deed. *Spaulding v. Collins* 488

2. SAME—PART PERFORMANCE—ADVERSE POSSESSION BY GRANTOR. In such a case, continued possession of the mortgaged property by the mortgagor *cestui que trust* for twenty years after execution of the deed, by consent of the grantee and without payment of rent or any accounting, is not such part performance of the trust as to take the same out of the operation of the statute of frauds, or to permit of parol evidence to establish the trust; and such possession is not adverse to the grantee. *Spaulding v. Collins*..... 488

UNIVERSITIES:

See COLLEGES AND UNIVERSITIES.

UNLAWFUL DETAINER:

See LANDLORD AND TENANT, 3, 4.

VACATION:

Sale of decedent's property, see EXECUTORS AND ADMINISTRATORS, 6.
Of judgment or order, see JUDGMENT, 2-5.

VALUE:

Limits of jurisdiction, see APPEAL AND ERROR, 1-4.
Of attorney's services, see ATTORNEY AND CLIENT, 2, 3.
Evidence of value of goods in action for conversion, see CARRIERS, 4
Evidence of value of services of attorney, see DAMAGES, 1.

VARIANCE:

Between pleading and proof in action for services, see PLEADING, 13.
Relief under cross complaint in action for separate maintenance, see QUIETING TITLE, 2.

VENDOR AND PURCHASER:

Bond to assure title to land purchased, see BONDS.
Authority of broker to execute binding contract of sale, see BROKERS.
Title to crops under contract providing for payment of purchase price out of proceeds of crops, see CROPS, 2.
Parol evidence to show intent to make option agreement, see EVIDENCE, 7.

VENDOR AND PURCHASER—CONTINUED.
Sale of realty by executor or administrator, see EXECUTORS AND ADMINISTRATORS, 5-7.
Allowance of interest after tender of purchase money, see INTEREST.
Right of purchasers as to party walls, see PARTY WALLS.
Authority of agent as to execution of contract of sale, see PRINCIPAL AND AGENT, 1.
Transfers of ownership of personal property, see SALES.
Specific performance of contract, see SPECIFIC PERFORMANCE.
Conversion of building by vendee under contract to purchase land, see TROVER AND CONVERSION, 2, 3.
Trusts resulting in favor of party advancing money, see TRUSTS.

1. VENDOR AND PURCHASER—RESCISSION BY VENDEE—COVENANTS—MUTUALITY—BREACH—REMEDY. Covenants in a contract for the sale of land relating to building restrictions and the making of street improvements by the grantors, are independent of the covenants to convey and pay the purchase price; and the grantee's remedy for a breach is an action for damages, and not rescission, where performance, and the time therefor, on one side was quite independent of performance on the other, and a breach goes only to part of the consideration and can be compensated in damages. *Crampton v. McLaughlin Realty Co.* 525

2. VENDOR AND PURCHASER—CONTRACTS—CONCURRENT AGREEMENTS—FORFEITURE—TENDER OF CONVEYANCE. The terms of an agreement wherein the defendants were to purchase land of the state and convey a part to the plaintiff, who was to pay one-fourth of the price, are mutual, concurrent and dependent; and the defendants cannot claim a forfeiture without tender of conveyance after the title was acquired from the state. *Tacoma Water Supply Co. v. Dumermuth* 609

3. VENDOR AND PURCHASER—CONTRACTS—COVENANTS—FORFEITURE FOR BREACH—DAMAGES. A contract by a vendee to build a sightly tank on the property purchased is collateral and not ground for forfeiture of the contract, the remedy for breach being an action on the covenant. *Tacoma Water Supply Co. v. Dumermuth*..... 609

4. VENDOR AND PURCHASER—RESCISSION BY VENDOR—CONTRACTS—DEFAULT IN PAYMENT—WAIVER. Time is not made the essence of a contract for the purchase of property by a provision that the balance of the purchase price shall be "payable $5 and interest . . . on deferred payments monthly," where it was further provided that payments were to be made in work by the purchaser, who was a brick mason; and the same cannot be rescinded by the vendor for defaults in payment prior to the expiration of the contract, where for two years payments had not been made monthly but work had been accepted at irregular intervals. *Lillis v. Steinbach*..... 402

5. VENDOR AND PURCHASER—RESCISSION BY VENDOR—OPTION—FORFEITURE OF PAYMENTS—EXECUTION OF OPTION—ACCEPTANCE OF MORTGAGE. The forfeiture of preliminary payments under an optional

VENDOR AND PURCHASER—CONTINUED.
contract for the purchase of land, of which time is of the essence, are waived by the execution of a deed and the acceptance of notes secured by a mortgage, pursuant to a clause of the option agreement providing therefor, even though the mortgage was insufficient in form, where there was no fraud and no intervening rights of third parties, and the parties were proceeding in good faith to carry out the contract; since the option may be considered executed, and forfeitures are not favored. *Spedden v. Sykes*..... 267

6. VENDOR AND PURCHASER—RESCISSION BY VENDOR—WAIVER OF FORFEITURE. The forfeiture of payments made under a contract for the purchase of land cannot be claimed by a vendor seeking rescission after acceptance of notes secured by an informal or insufficient mortgage, where no demand was made for a formally executed mortgage. *Spedden v. Sykes*..... 267

7. SAME—ABANDONMENT BY VENDEE. Abandonment of a contract to purchase real estate is not shown by the fact that the vendee for two years made none of the five-dollar monthly payments which were to be made in work, as near as could be, when the bid was as low as other bids, where, having paid in work for some time, the vendee twice offered work which was rejected, and thereafter failed to offer work for two years and failed to pay taxes which he had agreed to pay, the time for final payment not having expired and time not being of the essence of the contract. *Lillis v. Steinbach* 402

8. VENDOR AND PURCHASER—ASSIGNEE OF CONTRACT—DEFAULT IN PAYMENT—CONTRACTS—AMBIGUITY. The assignee of an option to purchase land is not, by reason of failure in tendering payments, in default to the extent of rendering him liable to the assignor for the price agreed between them, where the option contract is ambiguous, stating in one place that $30,000 was the full purchase price, and in another requiring payments aggregating $38,000, in the absence of an explanation of the ambiguity or price. *Lawson v. Sprague*.. 286

9. VENDOR AND PURCHASER—ASSIGNEE OF CONTRACT—DEFAULT IN PAYMENT—DEFECT IN TITLE—PLEADING—LEGAL CONCLUSIONS. Where the vendor was not in position to convey property by a "good and sufficient title," by reason of the fact that part of the land was shore land belonging to the state, an assignee of the contract, under obligation to pay for the assignment upon the consummation of the deal, is not in default by reason of failing to tender the price, since a tender would have been unavailing; and a complaint by the assignor showing the defect in the title is not aided by pleading the contrary legal conclusion that defendant agreed to accept the title as exhibited, the contract set out calling for a good title. *Lawson v. Sprague* 286

10. VENDOR AND PURCHASER—REMEDY OF VENDOR—ACTION FOR PRICE—DEFENSES. Where, by the terms of a contract, $1,650 was to be paid in cash for land sold, and plaintiff had receipted for that sum on

VENDOR AND PURCHASER—CONTINUED.
payment of $1,500, it is a good defense to an action for the balance that the parties had verbally agreed that two lots were to be conveyed and received in lieu of $350, and that defendants tendered a deed thereof. *Lanning v. McNeill*..... 38

VENUE:
Evidence of venue, see CRIMINAL LAW, 3.

VERDICT:
Review on appeal or writ of error, see APPEAL AND ERROR, 38-41.
Remission of part of verdict as error favorable to appellant, see APPEAL AND ERROR, 45.
Inadequate or excessive damages, see DAMAGES, 3-5.
Direction of verdict in favor of one joint tort feasor as affecting liability of city, see JUDGMENT, 1.
Award of damages to property by reason of local improvement, see MUNICIPAL CORPORATIONS, 1-6.
Damages for obstructing navigable river, see NAVIGABLE WATERS, 4-8.
Directing verdict in civil actions, see TRIAL, 7.

VIEW:
Review of denial of motion to view premises as dependent on exception in lower court, see CRIMINAL LAW, 9.

WAIVER:
Of exceptions or objections, see APPEAL AND ERROR, 10.
Of error on appeal, see APPEAL AND ERROR, 33, 34.
Of demand for goods in action for conversion, see CARRIERS, 3.
Objections to nonpayment of license fee by corporation, see CORPORATIONS, 4.
Of right to demand interrogatories, see DISCOVERY.
Objections to establishment of drainage district, see DRAINS, 2.
Exemption from execution, see EXEMPTIONS.
To treat mortgage debt as due on default, see MORTGAGES, 3.
Objections to assessments for public improvements, see MUNICIPAL CORPORATIONS, 5, 6.
Notice of filing transcript on appeal from confirmation of local assessment, see MUNICIPAL CORPORATIONS, 8.
Of objections to complaint on ground of variance, see PLEADING, 13.
Of right to rescind contract for fraud, see SALES, 2.
Tender, see TENDER, 2.
Of provisions in contract for sale of land, for payment, see VENDOR AND PURCHASER, 4-6.

WARRANTY:
On sale of goods, see SALES, 1, 2.

WATERS AND WATER COURSES:

Construction of contract for sinking city wells, see CONTRACTS, 1.
Works for protection or improvement of lands, see DRAINS.
Exercise of power of eminent domain by water company, see EMINENT DOMAIN, 1-3.
Waters capable of navigation as public highways, see NAVIGABLE WATERS.

WILLS:

Administration and proceedings under nonintervention will, see EXECUTORS AND ADMINISTRATORS, 2-4.

1. WILLS—WHAT LAW GOVERNS—DATE OF TESTATOR'S DEATH. The right to make a testamentary disposition of property is governed by the laws in force at the date of the testator's death, and wills must conform thereto. *Strand v. Stewart*..... 685

WITHDRAWAL:

Of deed in escrow as affecting title of grantee, see ESCROWS, 2.

WITNESSES:

Experts, see CRIMINAL LAW, 2.
Competency of expert witnesses in civil actions, see EVIDENCE, 8, 9.

1. WITNESSES—CALLING ADVERSE PARTY—REBUTTAL. Bal. Code, §§ 6008, 6012, expressly authorize the examination of the adverse party as a witness, and the rebuttal of his evidence by adverse testimony, although he was called as the party's own witness at the opening of the trial. *Thomas v. Fos*..... 250

2. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED. A plaintiff seeking to recover title to land alleged to have been held in trust for her by her deceased daughter is prohibited from testifying to any transaction had with, or statements made to, the deceased explanatory of plaintiff's method of bookkeeping where it appears that plaintiff meant to assert that entries represented payments on the purchase price of the land. *Smith v. Scott*..... 330

3. WITNESSES—COMPETENCY—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT. It is not incompetent, as a privileged communication between attorney and client, to show by the testimony of the attorney that the grantor in a deed employed him to effect a gift of the land to the grantee, reserving the rents and profits during the lifetime of the grantor, and for that purpose a deed was made and delivered to a third party specifying that it was to be held during the grantor's life and after death delivered to the grantee. *Maxwell v. Harper* 351

4. WITNESSES—IMPEACHMENT—LAYING FOUNDATION. It is not prejudicial error to permit impeachment of a witness without laying formal or regular foundation, where the conversation in question had been sufficiently called to the attention of the witness while on the stand, and he recalled the circumstances but denied the conversation. *Nethery v. Nelson*..... 624

WOODS AND FORESTS:

Trespass in cutting timber, see TRESPASS.

WORK AND LABOR:

Claim for rental of tools as constituting lien, see AGRICULTURE.
Contracts of employment, see MASTER AND SERVANT, 1.
Liens for work and materials, see MECHANICS' LIENS.
Reply as departure in pleading in action for services, see PLEADING, 6.

1. WORK AND LABOR—CONTRACT FOR EMPLOYMENT—BREACH—MITIGATION OF DAMAGES. Recovery of the whole salary for a wrongful discharge from employment cannot be sustained where the plaintiff had obtained other employment at the same salary. *Hampton v. Buchanan* 155

WRITINGS:

Admissibility of parol evidence to vary, see CONTRACTS, 4-7.
Handwriting as evidence, see CRIMINAL LAW, 1.
Written instructions, see TRIAL, 10, 11.

WRITS:

See PROCESS; PROHIBITION; REPLEVIN.